Petition

No. 81-440

Office-Supreme Court, U.S.
FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO., LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS PETITION FOR WRIT OF CERTIORARI

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, Pennsylvania 15230
412-288-3144

Counsel of record
for Cross petitioners

Of counsel:

THOMAS P. LAWTON III

August 31, 1981

HERBICK & HELD PRINTING CO., 1117 WOLFENDALE STREET, PITTSBURGH, PA. 15233

QUESTIONS PRESENTED

1. Did the federal district court deny cross-petitioners, the non-resident defendant corporations who were contesting jurisdiction over their persons, due process of law by imposing a sanction finding them subject to personal jurisdiction for failure to produce extremely voluminous records at the office of counsel for cross-respondent, plaintiff-appellee below, in the district, when (a) the non-residents had offered to produce them at their home offices abroad, (b) the records would not have shown that they had conducted any activities within the forum state, and (c) the court made no finding that the non-resident defendants' conduct was wilful, contumacious or in bad faith or that they were able to bring the records to the district?

2. Was not the District Court's denial of defendants' (cross-petitioners') motion to dismiss for forum non conveniens subject to review by the Court of Appeals in connection with the admittedly appealable injunction order?

PARTIES TO PROCEEDING IN COURT OF APPEALS

In addition to the parties named in the caption of the case in this court, the following were appellants in the Court of Appeals:*

Vesta (UK) Ltd.
Chiyoda Fire & Marine Insurance Co. Ltd., Tokyo
L'Union Atlantique S.A. d'Assurances, Brussels

LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONERS PURSUANT TO SUPREME COURT RULE 28.1 AS AMENDED

A list of the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of each of the cross-petitioners having any such related corporations is set forth in appendix N, pages 91a-94a.

---

*Mercantile & General Reinsurance Co. Ltd., erroneously named in the caption in the Court of Appeals, was not a party to the appeal, the action having been dismissed as to it by the District Court after its obligations had been assumed by The Insurance Corporation of Ireland, Ltd. (64a). The caption in the District Court was amended to delete Mercantile & General's name (64a).

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties to Proceedings in Court of Appeals ii

Listing under Supreme Court Rule 28.1 ii

Table of Contents iii

Table of Authorities vi

Cross-petition for Writ of Certiorari 1

Opinions Below 1

Judgment to be Reviewed 2

Petition for Certiorari 2

Statement of Jurisdiction 3

Statute Involved 3

Statement of the Case 4

Basis for Federal Jurisdiction in the District Court 7

Reasons for Granting the Writ 8

Argument 9

I. THE FINDING OF PERSONAL JURISDICTION OVER DEFENDANTS BASED ON THE SANCTION ORDER DENIED THEM DUE PROCESS OF LAW 9

A. A sanction should not be imposed upon a party without a finding of ability to comply with a production order and wilfulness, contumacy or bad faith in failing to do so 9

B. In the case at bar no finding was made that cross-petitioners were able to comply with the order to produce the documents and had wilfully failed to do so .. 20

Table of Contents.

PAGE

C. Cross-petitioners offered to produce their records before they were ordered to do so 21

II. WHEN AN ORDER OR JUDGMENT IS PROPERLY APPEALED, THE COURT OF APPEALS MAY ALSO REVIEW OTHER ORDERS IN THE CASE NOT INDEPENDENTLY APPEALABLE 23

Conclusion 25

Appendices (bound separately)

COURT OF APPEALS

A. Opinion of the Court of Appeals by Aldisert, Cir. J. filed June 10, 1981 .... 3a

Opinion of Gibbons, Cir. J., dissenting in part, filed June 10, 1981 .... 21a

B. Judgment of the Court of Appeals entered June 10, 1981 .... 33a

C. Order of the Court of Appeals denying appellants' petition for rehearing en banc, entered July 7, 1981 .... 34a

D. Order of the Court of Appeals denying appellee's petition for panel rehearing, entered July 7, 1981 .... 36a

DISTRICT COURT

E. Oral statement in the nature of an Order by the District Court, made June 15, 1978 .... 38a

F. Oral statement in the nature of an Order by the District Court, made July 27, 1978 .... 40a

G. Oral statement in the nature of an Order by the District Court, made December 21, 1978 ... 43a

PAGE

H. Oral findings of fact and Order for preliminary injunction, made April 19, 1979 (as corrected April 23, 1979) 46a

I. Order entered June 25, 1979 granting Plaintiff's motion to continue hearing on permanent injunction 57a

J. Order entered June 25, 1979 granting plaintiff's motion for protective order 59a

K. Preliminary Statement, Findings of Fact, Conclusions of Law, and Order of the District Court in re Permanent Injunction, entered August 5, 1980 .... 61a

L. Preliminary Statement, Findings of Fact, Conclusions of Law, and Order of the District Court in re Forum non Conveniens, entered August 5, 1980 .... 80a

STATUTE

M. Pennsylvania Act of Assembly of November 15, 1972 P.L. 1063

8302a 89a

8309a 89a

8309b 90a

STATEMENT UNDER
SUPREME COURT RULE 28.1

N. Listing of parents, partially owned subsidiaries and affiliates of cross-petitioners 91a

TABLE OF AUTHORITIES

CASES

PAGE

In re Anthracite Coal Antitrust Litigation, 82 F.R.D. 364 (M.D. Pa. 1979) 9

Barbato v. Tuosto, 38 Misc.2d 823, 238 N.Y.S.2d 1000 (Supr. Ct. Monroe Co. 1963) 10

Barber-Greene Company v. Blaw-Knox Company, 239 F.2d 774 (6th Cir. 1957) 23

Bremson v. United States, 459 F.Supp. 121 (W.D. Mo. 1978) 12

Catlin v. United States, 324 U.S. 229 (1945) 24

Cox v. Pennsylvania R. Co., 72 F.Supp. 278 (S.D.N.Y. 1947) 25

Deckert v. Independence Corp., 311 U.S. 282 (1940) 23

Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) 10

Dunn v. Trans World Airlines, Inc., 589 F.2d 408 (9th Cir. 1978) 11

Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) ... 10

Edinburgh Assur. Co. v. R. L. Burns Corp., 479 F.Supp. 138 (C.D. Calif. 1949) 16

English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir. 1979), cert. den. 444 U.S. 832 (1979) 16

Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), cert. den. 68 L.Ed.2d 861 .... 16, 19

First National Bank of Wash. v. Langley-Howard, Inc., 391 F.2d 207 (3d Cir. 1968) 12

Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) 10

Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975) 11

CASES PAGE

Hanson v. Denckla, 357 U.S. 235 (1958) 15

Intern. Union, etc. v. Nat. Right to Work, 590 F.2d 1139 (D.C. Cir. 1978) 11

Kakuwa v. Sanchez, 498 F.2d 1223 (9th Cir. 1974) 21

Kozlowski v. Sears, Roebuck & Co., 71 F.R.D. 594 (D. Mass. 1976) 19

Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16 (S.D.N.Y. 1966) 17

Lundberg v. Welles, 93 F.Supp. 359 (S.D.N.Y. 1950) 12

Mayflower Industries v. Thor Corp., 184 F.2d 537 (3d Cir. 1950), cert. den. 341 U.S. 903 23

M'Iver v. Kyger, 3 Wheat. (17 U.S.) 53 (1818) 6

Niagara Duplicator Co. v. Shackleford, 160 F.2d 25 (D.C. Cir. 1947) 12

Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) 18

Rapoport v. Sirott, 418 Pa. 50, 209 A.2d 421 (1965) 22

Reed v. Ulmer, 308 F.2d 915 (5th Cir. 1962) 10

Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974) 11

Riverbank Laboratories v. Hardwood Products Corp., 220 F.2d 465 (7th Cir. 1955), rev'd on other grounds 350 U.S. 1003 (1956) 23

Robinson v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966) 12

Shaffer v. Heitner, 433 U.S. 186 (1977) 15

Shepard Niles Crane & Hoist Corp. v. Fiat, S.p.A., 84 F.R.D. 299 (W.D.N.Y. 1979) 25

Silas v. Sears, Roebuck & Co., Inc., 586 F.2d 382 (5th Cir. 1978) 21

CASES PAGE

Smith v. Schlesinger, 513 F.2d 462 (D.C. Cir. 1975) 19

Societe Internationale v. Clark, 9 F.R.D. 263 (D.D.C. 1949) 12

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 9

Steamship Co. of 1949 v. China Union Lines, Hong Kong, 123 F.Supp. 802 (S.D.N.Y. 1954) 11

Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976) 21

Taylor v. Portland Paramount Corporation, 383 F.2d 634 (9th Cir. 1967) 15

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 25

United States v. International Business Machines Corp., 60 F.R.D. 658 (S.D.N.Y. 1973) 19

United States v. Reynolds, 345 U.S. 1 (1953) 21

United States v. Sherwood, 312 U.S. 584 (1941) 18

Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231 (7th Cir. 1973) 11

Von der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir. 1962), cert. den. 370 U.S. 916 11

Von der Heydt v. Rogers, 251 F.2d 17 (D.C. Cir. 1958) 14

Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), cert. den. 434 U.S. 1020 11

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 15

STATUTES

Federal Tort Claims Act
(28 U.S.C. 2671 ff.) 21

	PAGE
Judiciary Act of June 25, 1948 c.646 (62 Stat. 869)	
Section 1254(1) (28 U.S.C. 1254(1))	3
Section 1332 (28 U.S.C. 1332)	7
Pennsylvania Act of Assembly of November 15, 1972, P.L. 1063	
Section 8302(a)	3
Section 8309(a)	3
Section 8309(b)	3
Pennsylvania Judicial Code of July 9, 1976, P.L. 586, ch. 53, subch. B. section 5322 (42 Pa. C.S.A. §5322)	3

COURT RULES

F.R.C.P. 37(b)	9
F.R.C.P. 82	18
Pa. R.C.P. 4008	22

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Cross-petitioners, The Insurance Corporation of Ireland, Ltd., and seventeen other insurance companies doing business on the London insurance market, appellants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 10, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit filed June 10, 1981, which affirmed the ruling of the District Court that cross-petitioners were subject to the in personam jurisdiction of the District Court for the Western District of Pennsylvania, and the dissenting opinion, are set forth in appendix A hereto, pages 3a and 21a, respectively.

The District Court (Simmons, D.J.) filed no opinions as such relating to his holdings subjecting cross-petitioners to personal jurisdiction, permanently enjoining them from further prosecuting an action they had commenced in the High Court of Justice of England, Queen's Bench Division, and denying their motion to dismiss for forum non conveniens. The District Court did file a preliminary statement, findings of fact and conclusions of law in support of the permanent injunction, set forth in appendix K hereto, pages 61a-77a, part of which (pp. 70a-72a, 75a-76a) relates to the question of in personam jurisdiction. The District Court also filed a preliminary statement, findings of fact and conclusions of law in support of his denial of defendants' (cross-petitioners') motion to dismiss for forum non conveniens, set forth in appendix L hereto, pages 80a-87a).

JUDGMENT TO BE REVIEWED

The judgment of the Court of Appeals sought to be reviewed, appendix B (33a), was dated and entered June 10, 1981. The order of the Court of Appeals denying appellants' (cross-petitioners') petition for rehearing and suggestion for rehearing en banc, filed June 24, 1981, appendix C (34a), was dated and entered July 7, 1981.

PETITION FOR CERTIORARI

The petition for certiorari by appellee in the Court of Appeals (plaintiff in the district court), in connection with which this cross-petition is filed, was received on August 11, 1981.

STATEMENT OF JURISDICTION

Jurisdiction to review the judgment of the Court of Appeals is conferred on the Supreme Court by the Act of Congress of June 25, 1948, c.646 (62 Stat. 869), section 1254(1) (28 U.S.C. 1254(1)).

STATUTE INVOLVED

Involved in this case is the Pennsylvania long-arm statute in effect in December, 1975, when the present action was filed and purported service made, the Act of Assembly of November 15, 1972, P.L. 1063, 8302(a), 8309(a) and (b) (formerly 42 P.S. 8302(a), 8309(a) and (b).[1] Copies of those sections are set forth in appendix M hereto, pages 89a-90a).

---

[1] The 1972 statute no longer appears in Purdon's Pennsylvania Statutes annotated, because it has been repealed and replaced by chapter 53, subchapter B of the Judicial Code of July 9, 1976, P.L. 586, effective June 27, 1978, which subchapter is known as the Uniform Interstate and International Procedure Act, section 5322 (42 Pa. C.S.A. §5322).

STATEMENT OF THE CASE

The cross-respondent (plaintiff-appellee below), a Delaware corporation, filed suit in December, 1975 on contracts of business interruption insurance for loss of income resulting from damage to plaintiff's bauxite processing plant in the Republic of Guinea, west Africa. The first count of the complaint, claiming $10 million from the Insurance Company of North America, the first layer carrier, was not involved in the appeal here in question.

In the second count plaintiff sued the cross-petitioners (appellants below) on contracts made in London for a second layer of insurance, for an additional $10 million. Cross-petitioners, defendants in the second count, were twenty-one non-Pennsylvania companies, all but four of which contested the jurisdiction of the District Court over their persons. Of the remaining seventeen, the Court of Appeals reversed the District Court's judgment of personal jurisdiction over three of them, so that cross-petitioners who are contesting the jurisdiction ruling are fourteen of the defendants in the second count. All fourteen of these cross-petitioners are incorporated in foreign countries in Europe and Asia, and neither plaintiff nor any of them maintains an office or does business in Pennsylvania or elsewhere on the American continent. The other four cross-petitioners, who are not contesting jurisdiction (Eagle Star, Hanover, Home and Turegum), also do not maintain any offices or do any business in Pennsylvania.

On March 22, 1979 defendants filed a declaratory judgment action in the High Court of Justice, Queen's Bench Division, against plaintiff. Plaintiff then sought in the District Court for the Western District of Pennsylvania, and obtained, a preliminary injunction enjoining defendants from further prosecuting their action in England (55a). The District Court ruled that defendants were subject to personal jurisdiction in Pennsylvania on various grounds, one of which was a sanction which he at that time imposed upon them for their failure to produce in Pittsburgh their voluminous files which they maintain at their home offices in or near London, and for their failure to produce even more voluminous records of insurance brokers in London, which plaintiff had requested in order to show what, if any, Pennsylvania business defendants had done in the past. Three of the defendants filed affidavits stating that they had no records at all of business in North America. The others had offered to produce their records at their offices in London.

After a three-day trial in November, 1979, the District Court on August 5, 1980 made the preliminary injunction permanent (77a) and denied defendants' motion to dismiss the action for forum non conveniens (88a). On appeal by defendants, the Court of Appeals (Seitz, C.J., Aldisert and Gibbons, JJ.), in an opinion by Judge Aldisert (3a), affirmed Judge Simmons' ruling on jurisdiction (17a) except as to the three defendants who had no records of North American business, as to whom the action was ordered to be dismissed for lack of personal jurisdiction (18a); reversed the permanent injunction (20a); and held the forum non conveniens order not appealable (20a). Judge Gibbons dissented (21a) on both the jurisdiction ruling (except that he concurred as to the three who were let out of the case) and on the forum non conveniens question.

After the Court of Appeals had on July 7, 1981 denied defendants' petition for rehearing en banc (34a) and plaintiff's petition for rehearing by the panel (36a), plaintiff obtained a stay of the mandate and on August 11, 1981 served and filed a petition for certiorari as to the reversal of the injunction and as to the dismissal of the action with respect to the three defendants who had no records to produce. Defendants then filed the present cross-petition for certiorari as to jurisdiction and forum non conveniens, in which fourteen of the cross-petitioners seek review of the Court of Appeals' affirmance of the District Court's order on jurisdiction, and all eighteen cross-petitioners seek review of the Court of Appeals' decision that the District Court's order on forum non conveniens was not appealable.

Although the District Court based his jurisdiction ruling not only on the sanction but on other evidence as well (48a-51a, 53a, 75a-76a), the Court of Appeals' affirmance was based only on the sanction. This was in accord with the contention of the cross-petitioners that the record did not contain any competent evidence (independent of the sanction) to support jurisdiction.[2] Since the Court of Appeals agreed with the cross-petitioners' argument that only the sanction could be considered (footnote 9, first paragraph, 17a), the issue as to jurisdiction on their present cross-petition is limited to whether the sanction order was correct. A chronological summary of the events in the district court relating to the sanction order, appearing in findings of fact Nos. 41-50 (70a-72a), confirms the fact that defendants had offered to produce all the records for inspection and copying by plaintiff in London (finding No. 46) well before the court entered the sanction order, indeed even before plaintiff filed its motion to compel (finding No. 47).

---

[2] Judge Aldisert's references in the second paragraph of footnote 9 (17a) are to an affidavit, which is not competent evidence: Marshall, C.J., in *M'Iver v. Kyger*, 3 Wheat. (17 U.S.) 53 (1818). Judge Aldisert's statement that a few policies were delivered to CBG in Pittsburgh is misleading in that it neglects to point out that their original delivery was to CBG's broker in London, and the delivery to CBG in Pittsburgh was by CBG's own agent. Defendants were expressly barred by the District Court from contesting or explaining the statements recited by Judge Aldisert in the second paragraph of footnote 9 (57a, 59a).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Plaintiff invoked the jurisdiction of the United States District Court for the Western District of Pennsylvania pursuant to section 1332 of the Act of Congress of June 25, 1948 c.646 (62 Stat. 869) as amended (28 U.S.C. §1332), alleging diversity of citizenship and requisite amount in controversy. Plaintiff is a Delaware corporation with its principal place of business in the Republic of Guinea, west Africa, the defendant-cross-petitioners are all corporations organized and existing under the laws of foreign countries (except Hanover and Home, New Hampshire corporations, two of the four who were not contesting jurisdiction). Neither plaintiff nor any of cross-petitioners maintains a place of business or does business in Pennsylvania or (except for Hanover and Home) in any other state of the United States.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals has raised important questions as to the proper application of the provisions of the Federal Rules of Civil Procedure relating to due process of law in subjecting foreign corporations not doing business in the forum state to personal jurisdiction solely on the basis of a sanction order which required them to produce voluminous documents in Pennsylvania before they had been found subject to personal jurisdiction. One of the questions is whether the Court of Appeals by its construction of the Federal Rules impermissibly effected an extension of its jurisdiction beyond that conferred upon it by statute. The decision of the Court of Appeals is squarely in conflict with a decision of the Court of Appeals for the Fifth Circuit holding that the District Court for the Southern District of Texas lacked jurisdiction to render a default judgment against foreign defendants who had refused to answer interrogatories, on the ground that the basis for personal jurisdiction over non-residents must first be established, before any order can be made against them.

The decision of the Court of Appeals in the present case is also in conflict with decisions of the Supreme Court and of the Courts of Appeals for the Second, Fourth, Fifth, Eighth, Ninth, Tenth and District of Columbia Circuits holding that sanctions are to be imposed only when the District Court has found that the party's failure to comply with discovery requirements was wilful, contumacious, or in bad faith and not from inability.

On the question of appealability of the forum non conveniens order, the decision of the Court of Appeals in the present case is in conflict with one of its own earlier decisions and with decisions of the Supreme Court and of the Courts of Appeals for the Sixth and Seventh Circuits.

ARGUMENT

I. The Finding of Personal Jurisdiction Over Defendants Based on the Sanction Order Denied Them Due Process of Law

A. A SANCTION SHOULD NOT BE IMPOSED UPON A PARTY WITHOUT A FINDING OF ABILITY TO COMPLY WITH A PRODUCTION ORDER AND WILFULNESS, CONTUMACY OR BAD FAITH IN FAILING TO DO SO.

The general rule is that a party who attempts to comply with an order to produce documents but is unable to do so through no fault of his own will not be penalized: *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), where the Court reversed an order which had dismissed plaintiff's complaint because plaintiff had not produced records, the production of which would have violated Swiss penal laws. Mr. Justice Harlan said (p. 212) that Rule 37 should not be construed to authorize dismissal because of petitioner's noncompliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not to wilfulness, bad faith or any fault of petitioner."

Mr. Justice Harlan also said (pp. 207-8) that the word "refuses" to produce in rule 37(b) meant no more than "fails" to produce. In 1970 the rule was amended by the substitution of "fails" and "failure" for "refuses" and "refusal." Thus under the rule as construed before, and as written after, 1970, wilfulness was a prerequisite to the imposition of a sanction order. "*Any* order imposing sanctions on the Defendants for failure to comply with the discovery orders must be preceded by a finding that the Defendants have acted willfully or in bad faith so as to obstruct the discovery by the Plaintiffs.": *In re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364, 368 (M.D. Pa. 1979) (emphasis supplied).

A wilful act is an act intentionally carried out in accordance with the will of the acting party.[3] But if that party is unable to do what he has been requested or ordered to do, his failure is not the result of wilfulness but of inability.[4] Before imposing a sanction, the court must conduct an evidentiary hearing to determine the question of the party's wilfulness, and failure to do so constitutes an abuse of discretion: *Flaks v. Koegel*, 504 F.2d 702 (2d Cir. 1974); *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir. 1977).

A sanction will be vacated when the court imposing it has made no finding that the failure was wilful, in bad faith or from lack of diligent effort, and the failure was due to inability to comply: *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970), where plaintiff's inability to produce the requested records arose from factual circumstances very similar to those in the case at bar. Plaintiff sued for the value of household goods and other property, including phonograph records made by her deceased husband, a well-known band leader, lost by defendants when she moved from Florida to California. Defendants propounded interrogatories asking her to describe in detail each missing or damaged phonograph record. Plaintiff attempted to obtain the necessary information from RCA Victor, but "RCA advised her attorney that the information, if available, would require a search of the RCA Archives and that such a search would take many months." The district court's order striking plaintiff's claims for the damaged and lost records was vacated by the court of appeals.

---

[3] Wilful can even mean "unreasonable". *Barbato v. Tuosto*, 38 Misc.2d 823, 238 N.Y.S.2d 1000 (Supr. Ct. Monroe Co. 1963).

[4] "Rule 37 is not a legal requirement of the impossible": *Read v. Ulmer*, 308 F.2d 915, 918 (5th Cir. 1962).

The response of the London brokers whom defendants, pursuant to Judge Simmons' directions, had asked to produce copies of policies showing Pennsylvania risks written by defendants, was the same. Defendants were unable, as a practical matter, to produce those policies in Pittsburgh, just as they were unable to produce in Pittsburgh their own four million files containing the original contracts of insurance (the placing slips) for such Pennsylvania risks.

It is the trial court's duty to consider whether less severe sanctions than those imposed will be appropriate: *Reizakis v. Loy*, 490 F.2d 1132 (4th Cir. 1974); *Vac-Air, Inc. v. John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir. 1973). "After all, the end to be accomplished is the production of the documents": *Steamship Co. of 1949 v. China Union Lines, Hong Kong*, 123 F.Supp. 802, 805 (S.D.N.Y. 1954). The sanction must be " 'no more severe *** than is necessary to prevent prejudice to the movant,' ": *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977), cert. den. 434 U.S. 1020. In the latter case the court also pointed out (p.504, fn. 22) that "on appeal from the order imposing sanctions, the appellate court will consider the propriety of the prior order for discovery."[5] To the same effect is *Intern. Union, etc. v. Nat. Right to Work*, 590 F.2d 1139 (D.C. Cir, 1978), where the court said (p. 1152):

> "The validity of the sanctions imposed under Rule 37(b)(2)(A) depends, in the first instance, on the validity of the discovery orders on which they were based."

---

[5] In addition to the cases cited, the requirement of wilfulness obtains in all the other circuits where the question has been specifically dealt with: *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408 (9th Cir. 1978); *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975); *Von der Heydt v. Kennedy*, 299 F.2d 459 (D.C. Cir. 1962), cert. den. 370 U.S. 916.

The oral order for discovery in the case at bar (40a-41a) did not expressly state where the documents were to be produced, although the parties assumed that the office of plaintiff's counsel in Pittsburgh was intended. Where the documents are voluminous, the universal rule is that it is an abuse of discretion to require their production away from the place where they are kept: *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25 (D.C. Cir. 1947); *Societe Internationale v. Clark*, 9 F.R.D. 263 (D.D.C. 1949). In *Lundberg v. Welles*, 93 F.Supp. 359 (S.D.N.Y. 1950), Chief Judge Knox said (p. 363): "... I believe it would be needlessly oppressive were defendant compelled to transport voluminous records from California for inspection here."

Thus in the case at bar the order of the District Court, to the extent that it required the production in Pittsburgh of four million files which defendants maintained in London, constituted an abuse of discretion. Defendants were entitled to produce their files in London.

When a party is willing to comply with a proper discovery order, it is error to impose sanctions for past delay in compliance: *First National Bank of Wash. v. Langley-Howard, Inc.*, 391 F.2d 207 (3d Cir. 1968); *Robinson v. Transamerica Insurance Co.*, 368 F.2d 37 (10th Cir. 1966), at least where the delay does not severely prejudice the other party's case: *Bremson v. United States*, 459 F.Supp. 121 (W.D. Mo. 1978).[6] In the second case cited, the District Court for the District of Utah granted defendant's motion to dismiss the action for plaintiff's failure to answer interrogatories, despite the offer of plaintiff's counsel, at the hearing on the motion, to answer the interrogatories. In reversing the order of dismissal, the Court of Appeals, speaking through Chief Judge Murrah, said (368 F.2d at p. 39):

---

[6] Although delay in compliance until the eve of trial would not be tolerated, trial of the case at bar is not imminent even yet, because of two other cases filed by CBG (against INA only) to recover for other losses at its bauxite plant in Guinea which are awaiting trial (80a).

> "The plaintiff was derelict, but he was contrite. The trial court was obviously impatient, perhaps even injudicious. After all, the purpose of the discovery rules is to produce evidence for the speedy determination of the trial. The office of 37(d) is to secure compliance with the discovery rules, not to punish erring parties. We think the spirit and purpose of the rule would have been best served and the expense of this appeal avoided if appellant had been allowed to answer instanter, as apparently he was prepared to do."

The above language of Judge Murrah precisely fits the facts of the present case. On July 27, 1978 the District Court ordered defendants to request that the policies pertaining to Pennsylvania risks be supplied by the London insurance brokers for the various parties insured (40a-41a). Defendants were given three months to do this, and this period was later extended for another month, until November 25, 1978. During this period defendants' New York counsel went to London, interviewed his clients there and determined that the volume of such policies made it impossible, as a practical matter, to bring them to Pittsburgh, and on November 24, 1978 he offered to produce defendants' records at their offices in London (71a).

The District Court completely ignored, and failed to consider or comment on, the practical impossibility of bringing four million files from London to Pittsburgh. Judge Aldisert contents himself with saying (11a) that "the district court specifically found that CBG's request for documents was not burdensome," citing Judge Simmons' remarks on July 27, 1978 (40a-41a) that he could not see why it would be too burdensome for defendants to bring their files, or the files of the London brokers, to Pittsburgh. This was before defendants' New York counsel had ascertained the magnitude of the task, four million files to be searched (71a, 44a). Judge Aldisert's statement that it "was well within the trial judge's discretion to order that the necessary documents be brought to Pittsburgh" is incomplete in failing also to say that it was an abuse of that discretion to order four million files to be transported across the ocean, and to impose sanctions on defendants for not doing so.

Plaintiff's case would not have been prejudiced at all if the sanction had not been imposed: defendants offered to make their records disclosing Pennsylvania business available in London as early as November 24, 1978, and they again renewed their offer to have them ready for inspection beginning July 2, 1979, when plaintiff's counsel expected to be present in London. Plaintiff had a total of four lawyers in London at various times during the summer of 1979. If they had examined the records then, the appeal taken by defendants and the instant cross-petition for certiorari would not have been necessary.

The District Court's findings are also deficient in that they contain no finding that the records sought are material to the issue, which is a prerequisite to the entry of an order for sanctions: *Von der Heydt v. Rogers*, 251 F.2d 17 (D.C. Cir. 1958), in which the court in a per curiam opinion reversed an order dismissing a complaint on the ground of plaintiff's failure to produce documents. Circuit Judge (now Chief Justice) Burger said in a concurring opinion (p. 19):

> "While the District Court characterized its order as containing 'findings,' the recitals are conclusory in nature and, as all of us agree, those recitals do not give us an adequate basis for appellate review on the

specific issues we are compelled to treat; viz., (a) materiality of the information sought; (b) possession, custody or control of the information in appellant; and (c) refusal of appellant to obey an order made under Rule 34."

The documents requested by plaintiff in the case at bar did not contain information material to the jurisdiction point and would not have shown that defendants were subject to personal jurisdiction in Pennsylvania. As demonstrated by the policies and placing slips which defendants did produce in the present case, such records showed, at most, the amount of premiums defendants derived from risks in Pennsylvania. But revenues from the forum state alone are insufficient to subject a non-resident to personal jurisdiction: *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980); *Taylor v. Portland Paramount Corporation*, 383 F.2d 634 (9th Cir. 1967), where the Court of Appeals said that a contact with the forum state based only on revenues derived from it was "so tenuous as to offend due process." (p. 644). To subject a non-resident to personal jurisdiction, "it is essential . . . that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws": *Hanson v. Denckla*, 357 U.S. 235, 253-4 (1958), and it is essential that the defendant would have "reason to expect to be haled before [the forum state] court": *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

In the case at bar the District Court made no finding that the documents to be produced would show that defendants had conducted any activities in Pennsylvania, and the examples of insurance policies and placing slips which were produced would not support any such finding. Indeed, an insurance policy does not contain evidence that the insurer solicited the policy in the place where the risk is situated or where the insured resides. On the contrary, the manner in which risks are accepted on the London insurance market, as found by the District Court in the present case (findings Nos. 24-28, 66a), and as the Court of Appeals recognized was customary in London (4a),[7] shows that defendants conducted their activities entirely and only in London, and nowhere else in the world. Thus the records sought would not support a finding of in personam jurisdiction over defendants.

The Court of Appeals relied (15a) on *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979), cert. den. 444 U.S. 832, to support Judge Simmons' sanction order finding that cross-petitioners were subject to personal jurisdiction in Pennsylvania. The record before Judge Simmons, however, lacked the prerequisites to jurisdiction over nonresidents which were present in the record in the *English* case. The record there contained ample evidence, apart from that sought by the discovery request, to support a finding that the non-resident defendants had purposefully availed themselves of the benefits and protections of Nebraska law: 590 F.2d at page 726 and page 728, footnote 6. The imposition of a sanction was justified in that case because defendants never did comply with the discovery requests and orders to compel (pp. 727-8), whereas in the case at bar defendants offered to produce their records in London during the time allowed by the Court and before the motion to compel was filed. (71a).

The Court of Appeals in the case at bar expressly (16a) refused to follow *Familia de Boom v. Arosa*

---

[7] In using the words "the lead underwriter" (4a, line 18) Judge Aldisert misspoke. He meant to say "the broker for the prospective insured." The London practice is more fully described in *Edinburgh Assur. Co. v. R. L. Burns Corp.*, 479 F.Supp. 138, 144-6 (C.D. Calif. 1949).

Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), cert. den. 68 L.Ed.2d 861, in which a survivor and the personal representatives of seamen lost when their ship sank in the Gulf of Mexico sued her owner, Arosa Mercantil, S.A., and her charterer, Inversiones Calmer, S.A., in the District Court for the Southern District of Texas. The District Court entered a default judgment against Arosa for its failure to comply with an order directing it to answer interrogatories, and later included defendant Inversiones in the default judgment after it had filed answers to the interrogatories stating that it was unable to answer.[8] In reversing, the Court of Appeals clearly stated the applicable rule that the record must first support a jurisdictional finding before the court can make any order against defendants (p. 1138):

> "In this case, the plaintiffs were foreclosed from presenting jurisdictional evidence in the exclusive possession of the defendants because the defendants refused to disclose the information in response to discovery procedures. That the plaintiffs may have been unable to obtain information from the defendants, however, does not exempt them from this burden of proof. For us to uphold the district court's order of default we must find facts in the record to support the court's exercise of personal jurisdiction over Arosa and Inversiones."

The Court also said (pp. 1138-9):

> "Due to the posture in which this case comes before us, the facts relevant to the jurisdictional issue do not appear on the record. Therefore, we feel it is impossible for us to find personal jurisdiction in this case.

---

[8] A patently false answer is equivalent to a refusal to answer: *Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16, 24 (S.D.N.Y. 1966).

* * *

> "This leaves the district judge in a quandary in trying to enforce his discovery order, but that is a necessary result of the limitations of sovereignty under due process. Although the district court undoubtedly has jurisdiction to determine its own jurisdiction, it cannot, on its own, establish jurisdiction. The Federal Rules of Civil Procedure determine methods of service of process, venue and other procedural requirements for exercising jurisdiction in federal actions. They relate only to procedure, however, and not to principles of jurisdiction except insofar as service of process, made in accordance with the rules, itself is a way of demonstrating or completing the court's jurisdiction. Although Rule 37 allows for the imposition of *a default judgment as a sanction for failure to comply with discovery,* it *may be used only against parties who are within the court's jurisdiction.*" (emphasis supplied)

The Court nevertheless remanded the case to give the plaintiffs "another opportunity to develop additional facts which would support jurisdiction and valid service of process." (p. 1140).

The opinion of the Court of Appeals for the Fifth Circuit in the *de Boom* case, as well as Judge Gibbons' dissenting opinion in the case at bar (fn. 4, 29a), pointed to an important question in the present case as to the permissible scope of the Rules of Civil Procedure. It is well settled that the Rules do not create or enlarge the jurisdiction of the federal district courts: *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 370 (1978); *United States v. Sherwood,* 312 U.S. 584, 589-90 (1941); F.R.C.P. 82. By ordering the non-resident defendants to produce records in Pennsylvania, and subjecting them to personal jurisdiction and a possible judgment against them for not doing so, the District Court attempted to extend its jurisdiction beyond the territorial limits of Pennsylvania and the United States without any statutory authority to do so. The Rules of Civil Procedure do not provide a substitute for lack of statutory authority.

In the *de Boom* case the Court of Appeals for the Fifth Circuit refused to lift itself by its own bootstraps, which is what the Court for the Third Circuit has done in the present case. There was no need for it to do so, however, because defendants at bar are not inflexibly standing on their rights like defendants in the *de Boom* case. Defendants at bar were, and still remain, willing to furnish the requested documents at the only practicable place where they can be made available: in England. To subject them to jurisdiction by default when the evidence to prove or disprove the point at issue is available is most unreasonable and contrary to the purpose of the rules of civil procedure, which are intended to promote the production of evidence and the determination of disputes by resort to evidence.

In furtherance of this purpose of the rules, the courts have provided that a sanction order would be vacated upon compliance with the discovery order: *Smith v. Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975); *Kozlowski v. Sears, Roebuck & Co.*, 71 F.R.D. 594 (D. Mass. 1976); *United States v. International Business Machines Corp.*, 60 F.R.D. 658 (S.D.N.Y. 1973). In all those cases the refusal of discovery was intentional and was being persisted in when the sanction order was made; in the case at bar defendants were attempting to produce the documents and had offered to do so (at their home offices) even before the motion to compel had been filed (71a). The sanction order was completely unnecessary, and its imposition denied them due process of law.

B. IN THE CASE AT BAR NO FINDING WAS MADE THAT CROSS-PETITIONERS WERE ABLE TO COMPLY WITH THE ORDER TO PRODUCE THE DOCUMENTS AND HAD WILFULLY FAILED TO DO SO

The findings of the District Court relating to defendants' conduct in failing to bring their voluminous records and the even more[9] voluminous records of the London brokers to Pittsburgh, made when he entered the preliminary injunction on April 19, 1979 (49a-50a), contain no mention of any wilfulness, contumacy, bad faith or callous indifference to authority on the part of defendants or their counsel and no finding that they were able to bring four million files from London and produce them in Pittsburgh.

The findings made by the District Court in support of the permanent injunction after the hearing in November, 1979, relating to defendants' failure to produce the records in Pittsburgh (Nos. 41-50, 70a-72a) are equally void of any indication of wilfulness and the like. Nor is there any evidence elsewhere in the record that defendants and their counsel flouted the Court's authority. On the contrary, their New York counsel first indicated willingness to bring the records to Pittsburgh, but when he ascertained that their volume rendered this impracticable, he offered to make them available in England (44a, 71a). The District Court and the Court of Appeals both ignore this, the only reasonable, sensible and practicable manner of handling the problem.[10]

---

[9] Defendants' record for each insurance contract consisted of a placing slip containing a one-page summary of the terms of the insurance written and one or more additional pages containing the acceptance stamps and initials of the underwriters who accepted shares in the risk. The policies themselves, copies of which the brokers retained, were much longer, having as many as twenty or more pages each.

[10] In stating (12a) that defendants' offer to produce their records in London "was neither included in any of the answering papers in the discovery

C. CROSS-PETITIONERS OFFERED TO PRODUCE THEIR RECORDS BEFORE THEY WERE ORDERED TO DO SO.

It obviously would have better suited plaintiff's convenience to have the records brought to Pittsburgh. Since this was a practical impossibility, defendants offered a reasonable alternative: production in London.[11] Plaintiff should have accepted this and thus eliminated the necessity and expense of the subsequent appeal and certiorari proceedings. A similar situation arose in *United States v. Reynolds*, 345 U.S. 1 (1953), where the United States, defendant in an action under the federal Tort Claims Act (28 U.S.C. 2671 ff.) brought by the personal representatives of individuals killed in the crash of a military aircraft, refused to produce certain records on the ground that they contained military secrets. The District Court for the Eastern District of Pennsylvania entered a sanction order that the issue of negligence would be taken as established in plaintiffs' favor, and, after a hearing to determine damages, entered judgment for plaintiffs. The Court of Appeals for the Third Circuit affirmed, but the Supreme Court reversed and remanded. With respect to the necessity for compelling the production of the records, Chief Justice Vinson said (p. 11):

---

proceedings nor was it made during any of the hearings," Judge Aldisert has overlooked the repetition of that offer in defendants' answer filed November 28, 1978 to plaintiff's motion to compel and in the oral offer of their counsel at the hearing on December 21, 1978 (44a).

[11] Judge Aldisert castigates (12a) cross-petitioners for making the offer to produce the records at their home offices "quite late in the proceedings, . . . tucked away in an affidavit filed by the insurers' New York counsel. . . ." Ineptness of counsel cannot be characterized as contumacious or in defiance of the court's authority: *Kakuwa v. Sanchez*, 498 F.2d 1223 (9th Cir. 1974). Severe sanctions should not be imposed on a party when the fault lies with his counsel: *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382 (5th Cir. 1978). In such situation the court does not penalize the party, but will impose monetary sanctions on his counsel if warranted: *Szilvassy v. United States*, 71 F.R.D. 589 (S.D.N.Y. 1976).

> "Here, necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity.
>
> "There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted."

For the same reasons, defendants' offer to produce their records in London should have been accepted.

A situation similar to that in the present case arose in *Rapoport v. Sirott*, 418 Pa. 50, 209 A.2d 421 (1965), where defendant, while contesting personal jurisdiction, refused to appear for a deposition in Pennsylvania, and a default judgment was entered against him by the Court of Common Pleas in Philadelphia, despite his offer to testify at his residence in Nevada. The Supreme Court vacated the judgment and remanded the case with instructions to direct defendant to appear for deposition in Nevada.[12]

---

[12] The Supreme Court also ordered defendant to pay plaintiff's counsel fees and expenses involved in taking the deposition in Nevada. This was in accord with Pa.R.C.P. 4008. Cross petitioners at bar would not object to paying the fees and expenses of cross-respondent's counsel to examine the records in England if such records disclose sufficient activity by them in Pennsylvania to subject them to personal jurisdiction in Pennsylvania.

II. When an order or judgment is properly appealed, the Court of Appeals may also review other orders in the case not independently appealable

Although an order denying a motion to dismiss a complaint is not by itself appealable, when an appeal has been properly taken from an order which is appealable, such as an order granting a temporary injunction, the Court of Appeals has jurisdiction to review the district court's denial of defendants' motion to dismiss the complaint: *Deckert v. Independence Corp.*, 311 U.S. 282 (1940). The same principle authorizes appellate review of the denial of a motion to dismiss for improper venue.

Barber-Greene Company v. Blaw-Knox Company, 239 F.2d 774 (6th Cir. 1957).

Riverbank Laboratories v. Hardwood Products Corp., 220 F.2d 465 (7th Cir. 1955), rev'd on other grounds 350 U.S. 1003 (1956)

Mayflower Industries v. Thor Corp., 184 F.2d 537 (3d Cir. 1950), cert. den. 341 U.S. 903.

In the case first cited Blaw-Knox Company sued in the Northern District of Ohio for a judgment declaring six of Barber-Greene's patents invalid and not infringed. Three days later Barber-Greene sued Blaw-Knox in the Northern District of Illinois for an injunction and damages for infringement of the same six patents. The District Court for the Northern District of Ohio thereupon enjoined Barber-Greene from prosecuting the Illinois action and dismissed Barber-Greene's alternative motion to dismiss or transfer for improper venue. Barber-Greene then appealed from the injunction order and also sought review of the order refusing to dismiss the Ohio action for improper venue and refusing to transfer it to Illinois as the more convenient forum. In affirming the District Court for the Northern District of Ohio, the

Court of Appeals for the Sixth Circuit, speaking through Circuit Judge Potter Stewart, said (p. 776):

> "Although the district court's dismissal of the appellant's alternative motion to dismiss or transfer for improper venue is not itself an appealable order, it is reviewable on this appeal from a preliminary injunction."

In the third of the above-cited cases the Court of Appeals for the Third Circuit applied the same rule to permit review of an order denying plaintiff's motion to remand the action to the New Jersey Superior Court, from which it had been removed.

The above-quoted extract from the Barber-Greene case is precisely applicable to the case at bar. The Court of Appeals, overlooking that authority (which was cited in appellants' (cross-petitioners') reply brief, p. 2), contented itself (20a) with reciting the rule applicable when a motion to dismiss is the only subject of the appeal, where the "'denial of a motion to dismiss, even when the motion is based on jurisdictional grounds, is not immediately reviewable,'" quoting from *Catlin v. United States*, 324 U.S. 229, 236 (1945).

The motion to dismiss for forum non conveniens filed by defendants (cross-petitioners) in the case at bar was based on the lack of any connection of the parties and the events in dispute with the Commonwealth of Pennsylvania. As confirmed by the District Court's findings (Nos. 1-14, 61a-64a), neither plaintiff nor any of the defendants was incorporated in Pennsylvania, nor maintained an office there, nor did any business there, and the insurance contracts[13] on which defendants are being sued were made in England covering a loss in Africa. All the witnesses who will testify to the representations made to defendants' underwriters by plaintiff's London broker, when it induced them to agree to write the insurance on which plaintiff is suing, reside in England, and some of the witnesses, who are not in defendants' employ, have successfully refused to permit their depositions to be taken in London. Plaintiff contended that it had witnesses residing in Pennsylvania, but it did not state what they would testify to, a prerequisite for determination of forum non conveniens questions: *Cox v. Pennsylvania R. Co.*, 72 F.Supp. 278 (S.D.N.Y. 1947). None of the witnesses named by plaintiff participated in the contract negotiations, which provide the principal issues in dispute in this case. "... the relevant contacts for purposes of *forum non conveniens* are the issues in dispute, not uncontested issues": *Shepard Niles Crane & Hoist Corp. v. Fiat, S.p.A.*, 84 F.R.D. 299, 304 (W.D.N.Y. 1979).

---

[13] A separate contract was made by each defendant for the percentage of the risk which it accepted when its underwriter initialed the placing slip.

The Court of Appeals should have reviewed the ruling of the District Court which denied defendants' motion to dismiss for forum non conveniens.

CONCLUSION

The need to ensure that corporations organized in foreign countries will receive reasonable, sensible treatment and be accorded due process of law when they are haled before courts in the United States,[14] and the desirability of clarifying the scope and effect of the federal rules governing the imposition of sanctions, securing uniform interpretation of these rules in the court of appeals for each of the circuits, and ensuring that the decisions of the Supreme Court will be followed in all the circuits are the principal reasons for granting certiorari in the present case.

---

[14] The importance to American foreign trade that foreign business corporations receive reasonable treatment by American courts was pointed out by Chief Justice Burger in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 at pages 8-9, 11-12 (1972).

If the case is left in its present posture, it will go to trial. Should an appellate court subsequently agree with cross-petitioners that they are not subject to personal jurisdiction in Pennsylvania, or that the court in Pennsylvania was not the convenient forum for the trial, much time and effort will have been spent needlessly. Ultimate disposition will be more speedily advanced if the cross-respondent examines the requested records in London now. A definitive decision on the jurisdiction question will then be possible based on factual evidence rather than on a supposition which the evidence may (and cross-petitioners believe will) show to be unsupported. The cross-petition should be granted.

Respectfully submitted,

Edmund K. Trent
Reed Smith Shaw & McClay
747 Union Trust Building
P.O. Box 2009
Pittsburgh, Pennsylvania
15230
412-288-3144
Counsel of record for
cross-petitioners

Of counsel

Thomas P. Lawton III
August 31, 1981.

Appendix

No. 81-440

Office-Supreme Court, U.S
FILED
SEP 1 1981
NDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO., LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDICES
TO
CROSS PETITION FOR WRIT OF CERTIORARI

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, Pennsylvania 15230
412-288-3144

Counsel of record
for Cross petitioners

Of counsel:

THOMAS P. LAWTON III

August , 1981

HERBICK & HELD PRINTING CO., 1117 WOLFENDALE STREET, PITTSBURGH, PA. 15233

APPENDICES

Table of Contents

PAGE

COURT OF APPEALS

A Opinion of the Court of Appeals by Aldisert, Cir. J. filed June 10, 1981 .... 3a

Opinion of Gibbons, Cir. J., dissenting in part, filed June 10, 1981, as corrected June 16, 1981 21a

B Judgment of the Court of Appeals entered June 10, 1981 .... 33a

C Order of the Court of Appeals denying appellants' petition for rehearing en banc, entered July 7, 1981 .... 34a

D Order of the Court of Appeals denying appellee's petition for panel rehearing, entered July 7, 1981 .... 36a

DISTRICT COURT

E Oral statement in the nature of an Order by the District Court, made June 15, 1978 .... 38a

F Oral statement in the nature of an Order by the District Court, made July 27, 1978 .... 40a

G Oral statement in the nature of an Order by the District Court, made December 21, 1978 . ... 43a

H Oral findings of fact and Order for preliminary injunction, made April 19, 1979 (as corrected April 23, 1979) 46a

I Order entered June 25, 1979 granting plaintiff's motion to continue hearing on permanent injunction 57a

PAGE

J Order entered June 25, 1979 granting plaintiff's motion for protective order 59a

K Preliminary Statement, Findings of Fact, Conclusions of Law, and Order of the District Court in re Permanent Injunction, entered August 5, 1980 .... 61a

L Preliminary Statement, Findings of Fact, Conclusions of Law, and Order of the District Court in re Forum non Conveniens, entered August 5, 1980 .... 80a

STATUTE

M Pennsylvania Act of Assembly of November 15, 1972 P.L. 1063,
  8302(a) 89a
  8309(a) 89a
  8309(b) 90a

STATEMENT UNDER
SUPREME COURT RULE 28.1

N Listing of parents, partially owned subsidiaries and affiliates of cross-petitioners 91a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., MERCANTILE & GENERAL REINSURANCE CO., LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO., LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. & L'UNION ATLANTIQUE S.A. D'ASSURANCES BRUSSELS, all being corporations

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 75-1567)

Argued April 21, 1981

Before: SEITZ, *Chief Judge*,
and ALDISERT and GIBBONS, *Circuit Judges*.

(Filed June 10, 1981)

Edmund K. Trent, Esq. (Argued)
Thomas P. Lawton III, Esq.
Reed Smith Shaw & McClay
P. O. Box 2009
747 Union Trust Building
Pittsburgh, Pennsylvania 15230
Counsel for Appellants

Cloyd R. Mellott, Esq.
Dale Hershey, Esq. (Argued)
Robert W. Doty, Esq.
Jordan S. Weltman, Esq.
Eckert, Seamans, Cherin & Mellott
Forty-Second Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
Counsel for Appellee, Compagnie des Bauxites de Guinea

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The question presented for review is whether the district court erred in enjoining the defendants from pursuing an action in England's High Court of Justice, Queens Bench Division, which sought to rescind excess insurance contracts covering business interruptions of a Delaware corporation doing business in an African country. A threshold inquiry requires us to decide if the district court had jurisdiction over the defendants. We conclude that the court properly exercised personal jurisdiction over eighteen of twenty-one insurance companies and reverse the grant of the injunction.

I.

This is an unfortunate case filed in the district court in 1975 which still admits of no resolution on the merits but bears the scars of over five years of pre-trial skirmishing.[1] The appellee, Compagnie des Bauxites de Guinea (CBG), a Delaware Corporation owned by Halco (Mining), Inc. (51%) and the Republic of Guinea (49%), mines and sells bauxite. CBG operates only in Guinea; it is not registered to do business in Pennsylvania and conducts no business in the United States.

Acting as an agent for CBG, Halco obtained insurance coverage through the Pittsburgh office of Marsh & McLennan, an insurance brokerage firm. The coverage insured against losses up to $20,000,000 from business interruptions caused by breakdowns at CBG's processing plant in Guinea. The Insurance Company of North America, not a party to this appeal, insured the first $10,000,000 of loss; the appellants, a group of twenty-one foreign insurance companies, provided excess coverage of $10,000,000 on contracts issued through a London broker.

As is customary in London, the lead underwriter circulated a "placing slip" among representatives of interested insurance companies indicating the risks to be covered and the total coverage requested. The representatives then initialed the placing slip, indicating the percentage of risk their companies were willing to assume. After the coverage was fully subscribed the London broker prepared a "cover note" listing briefly the details of the risk and the premium. An actual policy is seldom issued at this stage and none was issued here. Instead, the excess insurers adopted the form of the INA policy "as far as applicable." App. at 136a.

Because of damage to its bauxite crushing plant, CBG presented a claim on its insurance coverage and the insurers refused to pay. CBG filed a complaint in December, 1975, in the Western District of Pennsylvania against all the insurance companies, asserting jurisdiction based on diversity of citizenship. 28 U.S.C. §1332(a). Almost four years later, while still participating in the pre-trial stages of this case, the excess insurers filed suit in England on March 22, 1979, seeking to rescind the excess insurance contract alleging that CBG failed to disclose material facts relating to the contract. CBG then moved the district court to enjoin the carriers from pursuing the English suit on the ground that it raised issues identical to those in the case at bar. After a hearing, the district court granted the motion, providing the order that is the subject of this appeal under 28 U.S.C. §1292(a)(1).

---

[1] The insurers have unsuccessfully appealed various aspects of the present case to this court on two previous occasions. No. 79-1511 (dismissed July 2, 1979) (motion to dismiss); No. 79-1513 (denied April 30, 1979)(stay of preliminary injunction).

II.

A district court must have personal jurisdiction over a party before it can enjoin its actions. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 112 (1969). The lack of jurisdiction is the initial question raised by the excess insurers.[2] The district court found personal jurisdiction under two independent theories. First, it held that the appellants' activities placed them within reach of the Pennsylvania long-arm statute. 42 Pa. Cons. Stat. Ann. §§8301-8311 (repealed June 27, 1978; current version at 42 Cons. Stat. Ann. §5322). Alternatively, the district court took as established, pursuant to Fed. R. Civ. P. 37(b)(2)(A), that it had personal jurisdiction as a sanction for the insurers' failure to comply with the court's order compelling discovery. The rule provides that "[i]f a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make . . . [a]n order that . . . designated facts shall be taken to be established for the purposes of the action. . . ."

---

[2] Seventeen of the twenty-one insurers appeal from the finding of lack of in personam jurisdiction. App. at 81a. Eagle Star Insurance Co., Ltd., Hanover Insurance Co., Home Insurance Co., Ltd., and Turegum Insurance Co., Ltd. concede personal jurisdiction. All of the insurers appeal from the order granting the permanent injunction as well as the denial of the motion to dismiss for *forum non conveniens*

A defendant's challenge to the court's in personam jurisdiction imposes on the plaintiff the burden of "com[ing] forward with facts, by affidavit or otherwise, in support of personal jurisdiction." *DiCesare-Engler Productions, Inc. v. Mainman Ltd.*, 81 F.R.D. 703, 705 (W.D. Pa. 1979); *see also Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). CBG had the ultimate burden of proving that the activities of the insurance companies brought them within the scope of the Pennsylvania long-arm statute.

The long-arm statute sets forth two independent tests for the assertion of in personam jurisdiction over foreign corporations. A court may exercise jurisdiction over a foreign corporation found to be doing business in Pennsylvania as the statute defines doing business. Alternatively, the assertion of jurisdiction over a foreign corporation is permitted so long as that assertion does not contravene the due process clause prohibition against assertions of jurisdiction that "offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Myer*, 311 U.S. 457, 463 (1940)); *see generally World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Only minimal contacts with the forum state are required to satisfy due process. *See McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957); *Aldens, Inc. v. Packel*, 524 F.2d 38, 42-44 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

III.

CBG sought by means of discovery to obtain evidence to meet its burden of proving either that the insurers were doing business in Pennsylvania or that there were sufficient contacts to satisfy due process. On August 9, 1976, it began what was to become a three-year discovery odyssey by serving a request on each defendant for copies of all business interruption insurance policies issued between January 1, 1972 and December 31, 1975, as well as all documents related in any way to the claim being made here. App. at 66a-69a. The carriers objected to the discovery request on January 24, 1977, claiming that compliance "would be extremely expensive and burdensome." *Id.* at 72a. CBG responded on May 12, 1977, by filing a motion to compel production. *Id.* at 74a. Over a year passed before the district court ruled on CBG's motion and ordered the excess insurers to produce the relevant documents. *Id.* at 515a-16a. During the interim, the insurance companies pressed their claim that the court did not have personal jurisdiction but did not relate that claim to the discovery order.

On May 20, 1977, seventeen of the twenty-one excess insurers filed a motion for summary judgment, contending that the complaint should be dismissed because the district court lacked personal jurisdiction over them. *Id.* at 78a-86a. According to the allegations of the motion and the supporting affidavits, none of these insurance companies was organized, licensed, or authorized to do business under the laws of Pennsylvania.[3] The excess insurers therefore concluded that the exercise of personal jurisdiction over them would constitute "a clear-cut violation of due process." *Id.* at 81a.

In an affidavit opposing the motion for summary judgment, CBG claimed that between 1971 and 1975, various excess insurers had participated in at least ten insurance contracts connected with CBG's operations in Guinea wherein the insurers agreed to be subject to suit in the United States. *Id.* at 172a-73a. A second affidavit contains a more general list of the contracts involving CBG and each of the excess insurance companies in which the Pittsburgh office of Marsh & McLennan acted as CBG's agent. *Id.* at 177a.

---

[3] Two of the insurance companies questioning the district court's in personam jurisdiction, Excess Insurance Co., Ltd. and English & American Insurance Co., Ltd., are registered as surplus line carriers in Pennsylvania, Pa. Stat. Ann. tit. 40, §1006.6, and have designated agents for service of process, *id.* at §1006.8. They argue that these facts should not distinguish them from the other fifteen insurers. We do not find it necessary to address that argument.

Recognizing, however, that the full extent of the insurers' contacts with Pennsylvania could only be determined by examining the insurers' records, CBG renewed its request for the production of "all cover notes and/or insurance policies wherein any of the excess insurer defendants participated as an insurer . . . which . . . were delivered in . . . Pennsylvania and/or covered a risk located in . . . Pennsylvania." *Id.* at 194a. This request of July 14, 1978, narrowed CBG's earlier discovery request of August 9, 1976, to encompass only policies with some logical relationship to Pennsylvania. The excess insurers again objected on the ground that the request included documents beyond the legitimate scope of discovery and that the request was unduly burdensome and oppressive. *Id.* at 195a-96a.

On July 27, 1978, the district court attempted to resolve the motions for production of documents by ordering the insurance companies to "furnish the names of the policies and the numbers and sort of a general outline of the policies, not in detail, of all the [Pennsylvania related] policies they [had] written from 1971 to date." *Id.* at 516a; *see* Fed. R. Civ. P. 37(a). Counsel for the carriers argued that obtaining the policies was no simple task because the policies would be available only in the files of London brokers. To satisfy CBG's request, "over 150 London brokers" would have to search through "hundreds of thousands of documents." App. at 517a. The district court found, however, that the request was not burdensome and that the process could be expedited by contacting the brokers immediately through form letters. *Id.* at 518a. The court granted the excess insurers' request for ninety days in which to comply with the order.

The insurers never questioned the district court's power to order production of their records. They recognized that the court had jurisdiction to determine whether it could properly exercise personal jurisdiction over them and therefore that it could compel discovery to aid in the resolution of that issue. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 n.5 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979); *In Re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1151 (N.D.Ill. 1979).

By October 25, 1978, the insurance companies were in violation of the order and asked for an additional thirty days to comply, representing to the court that "[c]ounsel has sought to secure the information necessary to answer plaintiff's interrogatories and *will probably be able* to complete the answers within thirty days from this date."[4] App. at 309a. (emphasis added). The court again granted their request. Although the excess insurers still had not produced any of the requested documents, the district court granted a final extension on December 21, 1978, giving the carriers until February 21, 1979, to comply with the discovery order. When granting the extension, the court warned the excess insurers that failure to produce the requested documents within this additional sixty days would result in the imposition of a sanction under Fed. R. Civ. P. 37(b)(2)(A) consisting of a finding of in personam jurisdiction. *Id.* at 542a.

At the close of the sixty day period, the excess insurers had produced only a few of the documents requested. The record indicates that no request that the English brokers forward the relevant policies was made until

---

[4] In answering the insurers' motion for an extension, CBG noted that no interrogatories remained unanswered. App. at 316a. We agree, and assume that the excess insurers and the district court, in granting the motion, were referring to the order to produce documents.

January 1979. *Id.* at 337a. This modest attempt to comply with the court order was not begun until long after the ninety day period the excess insurers requested in July 1978, and at least two months after their counsel represented to the court in Pittsburgh that the material would be forthcoming within thirty days. These facts make it difficult to conclude that the excess carriers made a good faith effort to comply with the court's orders of July 27, 1978 and November 8, 1978. It is one thing not to produce discovery material on time; it is quite another thing not even to begin to produce it.

On April 19, 1979, the district court "impose[d] a sanction consisting of a finding that the Excess Insurers are subject to the *in personam* jurisdiction of this Court because of their business contacts in Pennsylvania." *Id.* at 667a; *see* Fed. R. Civ. P. 37(b)(2)(A). The sanction was carefully limited to the action before the court; only the facts necessary to exercise personal jurisdiction were taken as established. *See English v. 21st Phoenix Corp.*, 590 F.2d at 728.

One month earlier, the excess insurers had filed suit in the High Court of Justice in London seeking to rescind the underlying insurance contract with CBG, contending that CBG had misrepresented material facts concerning the subject matter of the coverage. CBG then moved that the district court enjoin the insurers from pursuing the English action, claiming that it involved the same issues as the present case and was filed merely to harass CBG. App. at 342a-45a. Concluding that the English suit was duplicative, the district court granted CBG's motion for a preliminary injunction, App. at 674a, and on August 5, 1980, permanently enjoined the insurers from pursuing the English action during the pendency of the present case. *Id.* at 476a-77a.

IV.

The insurers attempt to justify their failure to produce the requested documents, arguing that they complied with the discovery order of the district court by offering to make the documents available for inspection by CBG at their home offices in London and Brussels. We are not persuaded by this argument.

As a general principle, a trial court has discretion to order one party to produce its records for another party during discovery. Fed. R. Civ. P. 34; *see, e.g., Jacobs v. Kennedy Van Saun Mfg. & Eng. Co.*, 12 F.R.D. 523 (M.D.Pa. 1952). In certain situations, however, a court may force the requesting party to inspect the documents at the convenience of the party who possesses them. *Gielow v. Warner Bros. Pictures*, 26 F.Supp. 425, 426 (S.D.N.Y. 1938); *cf.* Fed. R. Civ. P. 33(c) (When the answer to an interrogatory is contained in business records, and the burden of ascertaining the answer is substantially the same for both parties, the respondent may answer by specifying the relevant records and allowing an opportunity to examine them.)[5] Generally, inspection is required when the requested material is so voluminous that copying and transporting it would prove unduly burdensome and oppressive, *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F.R.D. 388, 389 (S.D.N.Y. 1940), or where the distance between the parties is great. *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25 (D.C. Cir. 1947); *see also Lundberg v. Welles*, 93 F.Supp. 359 (S.D.N.Y. 1950); *Harris v. Sunset Oil Co.*, 2 F.R.D. 93 (W.D. Wash. 1941). Here, the district court specifically found that CBG's request for documents was not burdensome, App. at 516a, 518a, and it was likewise unimpressed by the excess insurers' complaints that they would have to contact hundreds of London brokers. *Id.* at 517a. On the record before us, we cannot conclude that these findings were erroneous, and thus it was well within the trial judge's discretion to order that the necessary documents be brought to Pittsburgh for examination by CBG instead of requiring CBG to inspect the records at the home office of each of the twenty-one insurance companies.

---

[5] *See, e.g., Mid-American Facilities, Inc. v. Argonant Ins. Co.*, 76 F.R.D. 497 (E.D. Wisc. 1978); *Haykel v. G.F.L. Furniture Leasing Co.*, 76 F.R.D. 386 (N.D. Ga. 1976).

Moreover, the excess insurers' offer to permit home office inspection was made quite late in the proceedings. They did not make the offer of home office inspection when they replied to the original request for the documents that was made on August 9, 1976, or during the July 27, 1978 hearing at which they requested an additional ninety days to comply, or when they asked for a thirty day extension on October 25, 1978, or when they received a sixty day extension on December 21, 1978. When they finally made the offer on November 24, 1978, it was neither included in any of the answering papers in the discovery proceeding nor was it made during any of the hearings. Instead the offer was tucked away in an affidavit filed by the insurers' New York counsel supporting the summary judgment motion. *Id.* at 312a. At the same time that the excess insurers' New York counsel was offering to permit inspection, their Pittsburgh counsel was promising the court that their clients would comply with the discovery order if only given more time. *Id.* at 309a. Indeed, the Pittsburgh counsel did not begin to rely on the offer for home inspection until June 1979, two months after the district court applied sanctions and issued the preliminary injunction.

Thus, in our view this is not the garden variety geographic conflict about whether the mountain should come to Mahomet or vice versa.[6] Rather, we perceive the appellants' offer to provide home office inspection as a defense strategy that simply comes too late in these unduly protracted pre-trial proceedings to be of major significance in reviewing the imposition of sanctions by the district court.

---

[6] *See* F. Bacon, Essays: Of Boldness (1597).

V.

We will reverse a sanction imposed pursuant to Fed. R. Civ. P. 37 (b)(2) only if the district court abused its discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (per curiam); *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781, 788 (3d Cir. 1974). Discretion as a jural concept admits of some lack of precision, and formal definitions of the concept are only the inception and not the fruition of understanding. We agree with Professor Dworkin that discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction.[7] At best, this means that legislative or judicial authority should provide guidance to both the exerciser and the reviewer by defining with some specificity the permissible outer limits of the exercise of discretion.

The Federal Rules of Civil Procedure offer some guidance regarding the limits on the district court's power to impose sanctions. Rule 37(b) specifies two limitations. It states that the district court "may make such orders in regard to the failure [to obey an order compelling discovery] as are just," and it lists specific sanctions that, "among others," are contemplated by the rule. The order before us here easily satisfies both limits of discretion specified by the rule. Case law instructs that the district court's decision must be rationally related to the reasons given and the requirements of the rule. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. We are aided here by the trial court's explanation of the factors that led to its decision.[8] An appellate court is not free to substitute its judgment for that of the trial court, because the rules have invested the court of first instance with the expression of that judgment. *See DiGregorio v. First Rediscount Corp.*, 506 F.2d at 788. The review function is not plenary; to disturb the exercise we must find an abuse of authority, not merely the presence of an alternative reasonable choice. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642.

---

[7] R. Dworkin, Taking Rights Seriously 31 (1977); *see generally United States v. Criden*, —— F.2d ——, ——, No. 80-2622 (3d Cir. April 20, 1981), slip op. at 7-11.

---

[8]

> To show the full extent of the business done by the Excess Insurers connected with Pennsylvania, this Court, on July 27th, 1978, ordered the Excess Insurers to produce all insurance contracts which they had written since 1971 in which they provided coverage to Pennsylvania insureds, including Pennsylvania risks, or provided coverage through Pennsylvania brokers.
>
> The Excess Insurers, through their attorneys, promised on several occasions to comply with this Court's order, and obtained extensions of time in order to comply. The Excess Insurers produced only a few of the insurance contracts requested and under the circumstances the Court feels that the Excess Insurers have not offered the necessary assistance to the various brokers in gathering documents and getting the requested information which would be necessary under the circumstances.
>
> This Court, after some months of further delay, on December 21st, 1978, stated that if the Excess Insurers were to fail to produce the requested information within 60 days from that date, the insurance contracts, which were subject to its order of July 27, 1978, and showing the extent of the business contacts with Pennsylvania, that this Court would impose a sanction consisting of a finding that the Excess Insurers are subject to the in personam jurisdiction of this Court because of their business contacts in Pennsylvania. . . .
>
> [T]he Court finds, as a fact, that the material promised this Court by the Excess Insurers on December 21st, 1978, and prior to that time on July 27th, 1978, . . . has not been forthcoming, and the Court, at this point, will rule and impose a sanction, and does find that the Excess Insurers are, in fact, subject to the in personam jurisdiction of this court.

Id. at 666a-668a.

On the record before us, we are persuaded that the trial court did not exceed appropriate limits of its authority. The excess insurers negligently or deliberately flouted the district court's order compelling discovery. For over six months after the order was first issued, the insurers represented to the court that they were attempting to comply with the order. But the insurers did not even attempt to implement the court's order until January 1979, several weeks after being warned that failure to comply would force the court to impose sanctions. The English brokers were given less than a month to gather the documents, and later indicated that given sufficient time they could have complied with the discovery order. App. at 1303a, 1308a-10a, 1330a. In addition, the insurers produced none of their own records consisting of indexes and placing slips. The district court imposed the sanction in response to the excess insurers' dilatory conduct in dealing with the court throughout the discovery proceedings. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 640, 643; *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (per curiam).

The excess insurers argue, however, that the district court could only enter the sanction of denying the motion to dismiss for lack of subject matter jurisdiction, but could not "[take] as established for the purposes of the action" that appellants had sufficient contacts with the forum state to justify its exercise of in personam jurisdiction. We reject this argument. The purpose and scope of the ordered discovery were directly related to the issue of jurisdiction and the rule 37 sanction was tailored to establish as admitted those jurisdictional facts that, because of the insurers' failure to comply with discovery orders, CBG was unable to adduce through discovery. This was an appropriate exercise of the district court's discretion. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979).

We recognize that in *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, —— U.S. ——, 49 U.S.L.W. 3856 (May 18, 1981), the Fifth Circuit's position appears to be to the contrary, but we find ourselves in disagreement with that case. As long as discovery orders are permissible in aid of the jurisdictional determination, we think it fairly follows that a district court may respond to noncompliance by the party resisting a finding of jurisdiction with an appropriate rule 37(b)(2)(A) sanction. The availability of such a sanction is particularly important when, as here, the very material sought to be discovered — the defendants' contacts with the forum state — will normally be in the possession of a defendant and will frequently be unknown to a plaintiff. The district court's decision to take as established for purposes of this action that the insurers had sufficient minimum contacts with Pennsylvania, in response to the insurers' failure to comply with discovery orders issued to determine the existence of such contacts, was an appropriate exercise of its discretion under rule 37(b)(2)(A).

Furthermore, there is no question of the insurers having been unfairly surprised by imposition of the sanction. The district court gave ample warning of the sanction it would impose. *See* App. at 542a; *see also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. Jurisdictional issues should not delay the proceedings before a court more than necessary, and personal jurisdiction in particular is best settled at the outset of litigation if the judicial system is to operate efficiently and without diluting the quality of justice. *See Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, 528 F.2d 911 (3d Cir. 1976) (per curiam). We conclude that the district court's order was a proper application of Rule 37(b)(2)(A) that the designated facts "shall be taken as established for the purposes of the action. . . ."

Having concluded that the court did not abuse its discretion under the rule, the only remaining limitation on imposition of sanctions is the due process clause of the Constitution. The sanction did not violate the fifth amendment due process rights of the excess insurers. As this court has observed, "[o]nly where the sanction invoked is more stern than reasonably necessary does a denial of due process result." *DiGregorio v. First Rediscount Corp.*, 506 F.2d at 789; *see generally Societe Internationale v. Rogers*, 357 U.S. 197, 209-11 (1958). Here, the sanction was carefully tailored to fit the situation; only the facts necessary to establish the minimum contacts needed to justify personal jurisdiction in this action were taken as established pursuant to the sanction.

Accordingly, we will not disturb the discretion exercised by the district court in determining that the excess insurers were subject to the personal jurisdiction of the court because their business contacts in Pennsylvania were deemed established as a sanction for failure to make discovery.[9]

---

[9] Because of the view we take, it is not necessary to consider the other arguments advanced by the insurers, nor is it necessary to meet the district court's alternative determination that, based on the evidence before it, the excess insurers' activities did in fact constitute doing business in Pennsylvania.

We do not overlook the reality that CBG's contention that the excess insurers did do business in Pennsylvania was not fanciful. By affidavit dated March 19, 1979, CBG presented 24 insurance policies and cover notes reflecting coverage written for CBG between 1972 and 1977, in which various excess insurers participated. App. at 2010-2500. The policies were delivered to CBG in Pittsburgh at the office of Halco (Mining) Inc. Eighteen of the policies and cover notes are dated prior to the filing of the law suit here. In these policies the insurers agree to be subject either to the jurisdiction of American courts or to arbitrate policy disputes here.

VI.

Three of the excess insurers, Chiyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels, complied with the discovery order by filing affidavits stating that they had issued no policies covering risks located in Pennsylvania or associated with either CBG or the Pittsburgh office of Marsh & McLennan. App. at 236a, 493a, 323a. The sanction imposed by the district court because of the other insurers' failure to produce the requested documents should not apply to these three companies. In addition their contacts with Pennsylvania are simply inadequate to justify the exercise of personal jurisdiction pursuant to the Pennsylvania long-arm statute. The record discloses no evidence that these companies deliberately availed themselves of the privilege of doing business within the state, or indeed that they had any contacts that would justify a reasonable expectation of being haled into court there. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

We therefore will reverse the district court's determination that it had personal jurisdiction over Chiyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels and direct dismissal of the complaint with respect to them.

VII.

We now turn to the order enjoining the excess insurers from maintaining the action commenced by them in London. The general principle established "[e]arly in our history," is that one court will not interfere with or try to restrain proceedings in another in an ordinary action in personam. *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).[10] "[W]here the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939). This principle has often been applied in cases similar to the present case where one of the actions is in a foreign jurisdiction. *See Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969).

---

[10] The principle applied here does not contradict the "first-filed rule" established in *Crosley Corp. v. Hazeltine Corp.*, 122

In *Donovan*, the Supreme Court applied this general principle notwithstanding the lower court finding that the second action was harassing and vexatious. *See* 377 U.S. at 415 (Harlan, J. dissenting). Thus, the district court's finding that the action instituted in the English courts was duplicative, and therefore harassing and vexatious, does not affect our decision. Likewise, there is no difference between addressing an injunction to the parties and addressing it to the foreign court itself. *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849); *see also O'Hare International Bank v. Lambert*, 459 F.2d 329, 331 (10th Cir. 1972). Enjoining the parties necessarily affects the court and compromises "the comity which the federal courts owe to courts of other jurisdictions." *Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.*, 412 F.2d at 578.

F.2d 925 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942). The first-filed rule provides that when similar cases have been filed in different federal district courts, "it [is] the duty of the court first obtaining jurisdiction to enjoin the prosecution of the subsequent proceedings in the other court." *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp.*, 125 F.2d 1008, 1009 (3d Cir.), *cert. denied*, 316 U.S. 676 (1942); *see also Berkshire International Corp. v. Marquez*, 69 F.R.D. 583 (E.D.Pa. 1976). The rule has never been applied, and in fact it was never meant to apply where the two courts involved are not courts of the same sovereignty. *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d at 929. Restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore "requires that such action be taken only with care and great restraint." *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

We do not determine that the district court lacks the power to enjoin parties from pursuing an action in another jurisdiction in every case. It is sufficient here to hold that the district court abused its discretion when it enjoined an action seeking a declaratory judgment in the courts of another sovereign. In the present case, duplication of issues and the insurers' delay in filing the London action were the sole bases for the district court's injunction, and we hold that these factors alone did not justify the breach of comity among the courts of separate sovereignties.

Accordingly, we will reverse the order granting a permanent injunction restraining the insurers from further prosecution of the suit instituted by them in England in the High Court of Justice, Queen's Bench Division.

VIII.

Finally we address the order denying appellants' motion to dismiss on the basis of *forum non conveniens*. "[D]enial of a motion to dismiss, even when the motion is based on jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945). *See Fleming v. Berardi*, 441 F.2d 732 (3d Cir. 1971); *Commonwealth v. Brown*, 373 F.2d 771, 776 (3d Cir. 1967). Agreeing with Judge Maris, we believe that "little need be said"[11] and conclude that the order denying dismissal on the basis of *forum non conveniens* was inherently interlocutory since it did not terminate any phase of the litigation. Therefore, because it is not appealable under 28 U.S.C. §1291 as a final order and because no provision of 28 U.S.C. §1292 is applicable, we will dismiss the appeal on this issue for lack of jurisdiction.

---

[11] *Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.*, 506 F.2d 735, 742 (3d Cir. 1974).

IX.

For the reasons heretofore set forth, we will reverse the judgment of the district court issuing the injunction on August 5, 1980, and remand the cause for further proceedings in accordance with the foregoing.

GIBBONS, *Circuit Judge*, dissenting in part:

My difference with the majority is narrow. I join in part VI of the opinion of the court holding that there is no personal jurisdiction over Chioyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels. I also join in part VII, reversing the injunction against prosecution of the suit instituted by the excess insurers in the High Court of Justice, Queens Bench Division.

Moreover, I agree that under the controlling case law in this circuit a denial of a motion to dismiss on *forum non conveniens* grounds is not ordinarily immediately reviewable. I disagree with the conclusion in Part VII of the opinion of the court that that rule is controlling here, however, for several reasons. First, it seems clear that the *forum non conveniens* contention bears directly upon the propriety of the issuance of an injunction against prosecution of a parallel suit in London, and thus may properly be considered in connection with the disposition of the appeal from that injunction. We review the court's decision to exercise in personam jurisdiction by virtue of 28 U.S.C. §1292(a)(1). I see no distinction between reviewing that decision, otherwise interlocutory and unreviewable, and reviewing the decision refusing to dismiss on *forum non conveniens* grounds. The facts bearing upon a determination of adjudication competence for purposes of the due process clause and those bearing upon whether or not the chosen forum is excessively inconvenient may not be identical, but they certainly overlap to a large extent. Moreover both a decision to deny a Rule 12(b)(1) motion and a decision to deny a *forum non conveniens* motion would, if not reviewed at the outset, remain subject to review after final judgment. It makes no sense to me to leave this case in the posture in which one of two grounds which might after final hearing result in a dismissal is decided and the other left open. Even if this were an interstate rather than an international problem that result would be unsatisfactory, since it leaves open the possibility that a panel which later reviews the case may conclude that the trial should never have been held in Pennsylvania. In an international context the case for review now is even stronger, since even if a panel should later agree that Pennsylvania was a convenient forum, Great Britain need not afford that decision full faith and credit. Of course, had no injunction issued, neither ground for dismissal would be reviewed. But since 28 U.S.C. §1292(a)(1) permits review, we should consider and decide any ground which could be asserted against the propriety of injunctive relief. Certainly an injunction prohibiting trial in a more convenient forum would be error. Since, however, the majority has declined to review the *forum non conveniens* decision, and the record after final hearing on that issue may not be identical, it seems appropriate that I, too, decline at this time to express an opinion of its merits.

In Parts IV and V, the opinion of the court takes as established the jurisdictional facts supporting in personam jurisdiction, by virtue of a sanction imposed under Fed. R. Civ. P. 37(b). I disagree with the majority's conclusion that there was no abuse of discretion in imposing that sanction. The majority resorts to pejoratives such as "defense strategy" to characterize defendants' offer to permit inspection of voluminous documents in London rather than in Pittsburgh, and finds fault with the timing of that offer. But that argument ignores the foreign excess insurers' initial pleading that the Western District of Pennsylvania lacked personal jurisdiction to order them to do anything. Asserted from the outset, that position was never abandoned.

More significantly, the majority maintains the sanction was not an abuse of discretion because it "was carefully tailored to fit the situation; only the facts necessary to establish the minimum contacts needed to justify personal jurisdiction in this action were taken as established pursuant to the sanction." Slip op. at 15. *See also*, slip op. at 14. But the majority errs in characterizing the district court's exercise of personal jurisdiction as an example of minimum contacts, or specific, jurisdiction. The majority has "confounded specific jurisdiction to adjudicate claims linked to activities occurring or having an impact in the forum state, and general, 'all purpose' adjudicatory authority to hear and decide claims totally unconnected with the forum." *Donahue v. Far Eastern Air Transport Corp.*, —— F.2d —— (D.C. Cir. No. 80-1243, April 22, 1981, slip op. at 4). The district court exercised not specific, but general jurisdiction over the excess insurers. *See* App. 666-68. Specific and general jurisdiction analyses are quite distinct. *See generally* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966). The former inquires into minimum contacts; the latter mandates not minimal, but continuous and substantial forum affiliation.

As the Supreme Court enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316-19 (1945), minimum contacts analysis applies to the "single or occasional acts" of a nonresident defendant within a state when the suit concerns those acts, but not when the suit concerns matters unrelated to the forum activities. Moreover, the Supreme Court has repeatedly emphasized that in order to sustain assertion of specific jurisdiction, the plaintiff must show that the nonresident defendant's single or occasional acts within the forum state which gave rise to the claim manifest defendant's "purposefully availing itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Shaffer v. Heitner*, 433 U.S. 286 (1977); *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). Plaintiff's unilateral act within the forum state is insufficient to confer personal jurisdiction over the nonresident defendant. Similarly, defendant's fleeting or fortuitous forum connection lacks the requisite element of intentional invocation of the forum's benefits. Examination of the relevant transactions in this case reveals that the only contact the excess insurers had with Pennsylvania concerning this claim is too attentuated to meet the requirements of *Hanson v. Denckla* and its progeny. That contact amounts to a phone call placed by CBG's parent corporation's broker from Pittsburgh to Bland, Welsch in London requesting the London firm to secure agreements with foreign insurers in London to cover an African risk.

As a general rule, mere placing of a phone call by defendant into the forum state does not constitute "purposeful availing." *See, e.g., Covington Industries Inc. v. Resinex, Inc.*, 629 F.2d 730 (2d Cir. 1980) (defendant's telexes to Georgia from Switzerland concerning delivery of goods to Haiti do not constitute "transacting business" under the liberally interpreted Georgia long-arm statute); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (use of the telephone does not constitute purposeful activity under the fourteenth amendment due process clause); *Aaron Ferer & Sons Inc. v. Diversified Metals Corp.*, 564 F.2d 1211 (8th Cir. 1977) (defendant's phone call to Nebraska from Michigan concerning a Michigan contract does not constitute purposeful activity in Nebraska); *Northeast Timber Inc. v. Pines Trailer Corp.*, 501 F. Supp. 321 (E.D. Pa. 1980) (defendant's phone calls to Pennsylvania from Illinois do not constitute purposeful activity in Pennsylvania). It follows all the more forcefully that *plaintiff*'s or plaintiff's agent's phone call *from* the forum state concerning an out-of-state transaction does not draw defendant into invoking the forum state's benefits. *See, e.g., McBreen v. Beech Aircraft Co.*, 543 F.2d 26 (7th Cir. 1976) (out-of-state defendant's remarks in interstate phone call placed by plaintiff from the forum state do not constitute purposeful activity by defendant in the forum state); *Galaxy International, Inc. v. White Stores Inc.*, 88 F.R.D. 311 (W.D. Pa. 1980) (Pennsylvania company's phone call from Pennsylvania to defendant in Tennessee resulting in a contract to purchase beef from outside Pennsylvania is not purposeful activity in Pennsylvania).

Hence, given the undisputed facts bearing on specific jurisdiction, assertion of such jurisdiction based on the excess insurers' alleged minimum contacts with Pennsylvania would have been inappropriate. *International Shoe*, however, delineated another category in which assertion of personal jurisdiction over a nonresident defendant may be permissable. This is the general, or "all purpose" jurisdiction classification. It applies to claims *unrelated* to the forum, when the nonresident's contacts are "continuous" and "substantial."

> While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

326 U.S. at 318 (citations omitted).[1] *Bork v. Mills*, 458 Pa. 228, 231-32, 329 A.2d 247, 249 (1974); *Whalen v. Walt Disney World*, 418 A.2d 389, 391-92 (Pa. Super. 1980). *See also* Restatement 2d of Conflicts §47(2).

In order to maintain personal jurisdiction over the excess insurers, then, CBG must show that all the foreign excess insurers engaged in continuous and substantial business in Pennsylvania. In imposing personal jurisdiction by Rule 37 sanction, the district court therefore took as established not isolated contacts supporting the exercise of specific jurisdiction, but major "continuous corporate operations" in Pennsylvania by each excess insurer. By their nature, the facts requisite to asserting general jurisdiction cannot be "carefully tailored"; they must be extensive and pervasive.[2] The facts before the district court indicated that some of the excess insurers had entered into other contracts in which they agreed to be subject to suit in Pennsylvania or other United States jurisdictions. Standing alone. these contracts do not satisfy the continuous and substantial forum affiliation test.[3] In order to assert general jurisdiction, the district court was obliged to assume that these contracts were but a small part of a persistent pattern of sizeable business dealings with Pennsylvania insureds, or covering Pennsylvania risks. The necessarily broad scope of the jurisdictional facts the district court assumed, over defendants' denial, and without placing the burden of discovery on plaintiff, was an abuse of discretion.

---

[1] The Supreme Court has only once, since *International Shoe*, upheld the exercise of this category of personal jurisdiction. That decision, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), was something of an anomaly. The forum most connected with the defendant and with the disputed transaction was not Ohio, where plaintiff brought suit, but the Philippines, which at the time were under Japanese occupation. At the time, Ohio was the most related American forum. *Perkins* is arguably a jurisdiction by necessity decision. *See* Von Mehren & Trautman, *supra*, 79 Harv. L. Rev. at 1144 ("the *Perkins* decision should be regarded as a decision on exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction"). Von Mehren and Trautman argue that, "aside perhaps from the possibility of *limited* general jurisdiction based on the location of assets," specific jurisdiction should wholly supplant general jurisdiction. *Id.* (Emphasis in original).

[2] Pennsylvania decisions elaborating the "continuous and substantial" standard indicate a very high threshold of business activity. *See, e.g., Bork v. Mills, supra* (uncontroverted allegation that defendant hauled freight within Pennsylvania insufficient to meet continuous and substantial test), *compare* Scanapico v. Richmond, Fredricksburg & Potomac R. Co., 439 F.2d 17 (2d Cir. 1970) (en banc) (freight solicitation in forum by two employees, sale of tickets, and daily presence in forum of defendant's freight cars on trains operated by other carriers meets "doing business" test under New York service of process statute); Lebkuecher v. Loquasto, 255 Pa.

I do not advance the proposition that a Rule 37 sanction may never be employed to facilitate discovery of facts bearing upon the exercise of personal jurisdiction.

Super. 392. 389 A.2d 143 (1978) (possessing a license to practice medicine in Pennsylvania and maintaining a classified listing in a Pennsylvania telephone directory do not constitute continuous and substantial business activities); *Whalen v. Walt Disney World*, *supra* (purchase of $1.551.725 in merchandise from a company located in Pennsylvania. and purchase of liability insurance from a company incorporated in Pennsylvania do not meet continuous and substantial test); Garfield v. Homowack Lodge. Inc., 249 Pa. Super. 392. 378 A.2d 351 (1977) (weekly advertising in Philadelphia newspaper over five year period at cost of $2.000 per year. toll-free phone number to enable Philadelphia residents to make reservations at New York resort. and payment of 10% referral fee to Philadelphia travel agents constitute continuous and substantial business activity).

[3] *See* cases cited *supra* note 2. *Cf.* Bernardi Bros. v. Pride Mfg. Co., 427 F.2d 297 (3d Cir. 1970) (when claim unrelated to New Jersey, and defendant's sole contact with New Jersey was a nonexclusive agent residing in that forum. no basis for assertion of personal jurisdiction); DiCesare-Engler Productions. Inc. v. Mainman Ltd., 81 F.R.D. 703 (W.D. Pa. 1979) (rock star's occasional performances in Pennsylvania do not justify asserting personal jurisdiction over him in Pennsylvania when claim arose out of breach of contract to perform a concert in Ohio).

Nonetheless, the imposition of burdens of production in a distant place is one of the core elements of unfairness which the due process cases from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) through *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) address. It is small comfort to a defendant objecting to the imposition of that burden that it is being imposed only for the purpose of determining whether or not the court has authority to impose it. A proper accommodation between plaintiff's interest in a choice of a forum and defendants' due process protection against imposition of unfair burdens of production, it seems to me, requires that once a foreign defendant makes a *prima facie* showing both of absence of minimum contacts relating to the claim, and of absence of continuous and substantial forum presence, the plaintiff should have to do the initial traveling. *Cf. River Plate Corp. v. Forestal Land, Timber & Ry. Corp.*, 185 F.Supp. 832 (S.D.N.Y. 1960) (court's power to order compliance with discovery requests when it is unclear that the court has jurisdictional power over the defendant must be carefully circumscribed). Thus I would hold that the trial court abused its discretion in imposing the sanction of finding the jurisdictional facts against the defendant, at least until the court first ordered inspection of the relevant documents by the plaintiff at defendants' home base.

Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3856 (May 19, 1981), may possibly be read as prohibiting use of a Rule 37 sanction until such time as the plaintiff has fully met its burden of establishing personal jurisdiction. Were it so intended, I would not follow it that far. Defendant's refusal to permit inspection of documents at its home base at plaintiff's expense initially might support the imposition of the sanction imposed in this case. Such a refusal would effectively preclude the plaintiff from meeting its burden of establishing the jurisdictional facts. *Cf. Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10

(4th Cir. 1971) (dictum).[4] But it seems to me that an accommodation between the defendant's due process interests and the plaintiff's choice of a forum requires a more flexible interpretation of Rule 37 than the majority announces.[5] That is particularly the case when, as here, the record discloses no basis for the exercise of specific jurisdiction based on purposeful Pennsylvania contacts with the transaction sued on, and the attempted discovery is aimed at establishing a general corporate presence in that state. The far reaching inquiry into the establishment of general jurisdiction could impose costs and burdens far in excess of whatever premiums defendants derived from their prior forum activities. The record in this case establishes that many thousands of files would have to be examined to satisfy the plaintiff's inquiries. The burden of such an examination should have been placed initially on the plaintiff before sanctions were considered.[6] I would hold, therefore, that the trial court abused its discretion in imposing the Rule 37 sanction of finding the jurisdictional facts against those defendants left in the case. On the record, aside from the Rule 37 order, defendants maintain insufficient Pennsylvania connections to sustain either specific or general jurisdiction over them. I would reverse with a direction to grant their motion to dismiss.

---

[4] Even this basis for assertion of personal jurisdiction via discovery sanction is problematic, however. In effect, the district court would by relying on Rule 37 to *create* personal jurisdiction. This use of Rule 37 may well be inconsistent with Rule 82, which provides that the Federal Rules of Civil Procedure "shall not be construed to extend . . . the jurisdiction of the United States district courts. . .". Exercise of personal jurisdiction pursuant to a state long-arm statute involves both a fairness and a power analysis. *See, e.g., World Wide Volkswagen, supra*. It may not be unfair to subject the excess insurers to suit in Pennsylvania. They have certainly had notice and an opportunity to be heard. Fairness, however, is not all. The district court must also have some power over these defendants. On the facts available to the district court, it lacked that power. It is questionable whether a district court may concoct adjudicatory authority by virtue of defendant's flaunting the court's apparent lack of power. However frustrating defendant's recalcitrance, it does not imply, any more than does these defendants' partial compliance, that defendant in fact has maintained forum affiliations sufficient to justify assertion of either specific or general jurisdiction.

[5] The majority's reliance on English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), *cert. denied*, 444 U.S. 823 (1979), is misplaced. Although the Eighth Circuit affirmed the district court's assertion of personal jurisdiction as a Rule 37 sanction, the appellate court also observed that the nonresident corporation maintained sufficient forum affiliation to justify assertion of jurisdiction in any event. 590 F.2d at 728 n.6. Moreover, defendant's conduct in that case involved refusal adequately to answer, at its home base, written interrogatories. There was no burden of production at a distant place.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[6] Although defendants initially indicated they would comply with the district court's order to inspect and produce their documents in Pittsburgh, and subsequently and belatedly complied only partially, the district court entered the sanction to penalize not defendants' delay, but their insufficient compliance.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

vs.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., MERCANTILE & GENERAL REINSURANCE CO., LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO., LTD., YUVAL, THE INSURANCE COMPAMY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. & L'UNION ATLANTIQUE S.A. D'ASSURANCES BRUSSELS, all being corporations

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 75-1567)

Present: SEITZ, *Chief Judge* and ALDISERT and GIBBONS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on April 21, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed August 5, 1980, be, and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court. Costs taxed against appellee.

ATTEST:
SALLY MRVOS
Clerk

June 10, 1981

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA
vs.
INSURANCE COMPANY OF NORTH AMERICA, *et al.*
THE INSURANCE CORPORATION OF IRELAND,
LTD., *et al.*,
Appellants

(W.D. Pa. Civil No. 75-1567)

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge,* and Aldisert, Adams, Gibbons, Hunter and Higginbotham, *Circuit Judges.**

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Gibbons would grant the petition for rehearing for the reasons set forth in his dissenting opinion.

By the Court,
Aldisert
Judge

Dated: July 7, 1981

---

*Judges Weis, Garth an Sloviter did not participate in the consideration of this matter.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

vs.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., MERCANTILE & GENERAL REINSURANCE CO., LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO., LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., & L'UNION ATLANTIQUE S.A. D'ASSURANCES BRUSSELS, all being corporations

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE

INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO' LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,

Appellants

(D.C. Civil No. 75-1567)

Present: SEITZ, *Chief Judge*, and ALDISERT and GIBBONS, *Circuit Judges.*

ORDER

The petition for panel rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing before the original panel is denied.

By the Court,
ALDISERT
Circuit Judge

DATED: July 7, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA,THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,

Defendants.

Civil Action
No. 75-1567

TRANSCRIPT OF PROCEEDINGS

of hearing held in the aforementioned action beginning at 3:15 p.m., June 14, 1978, before Honorable Paul A. Simmons, District Judge.

* * * * *

(The proceedings were thereupon recessed at 4:30 p.m. and resumed at 9:30 a.m., June 15, 1978.)

* * * * *

THE COURT: We had better address 7, 9 and 11. Now, what about Number 7?

MR. BECK: Number 7 reads, "Copies of all business interruption insurance policies issued by Defendant during the period from January 1, 1972 to December 31, 1975. In the alternative, Defendant is requested to produce all standard forms, used by Defendant between January 1, 1972 and December 31, 1975, as sources for the drafting of business interruption coverage written by defendant."

* * * * *

THE COURT: I think it could lead to other information that would be relevant, so I think that is the test. We are going to overrule your objections on Number 7.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,

Defendants.

Civil Action
No. 75-1567

TRANSCRIPT OF PROCEEDINGS

of hearing held in the above entitled actions on July 27, 1978, before Honorable Paul A. Simmons, District Judge.

* * * * *

(The following proceedings were held beginning at 2:00 p.m., July 27, 1978, before Honorable Paul A. Simmons, District Judge.)

* * * * *

MR. MELLOTT: Well, will your Honor instruct them to produce for me all of the policies they have written covering risks in Pennsylvania?

THE COURT: I can't see why that would be burdensome.

* * * * *

THE COURT: That won't be bad. All right. Let's put on the record that the excess insurers, the 21 excess insurers will furnish the names of the policies and the numbers and sort of a general outline of the policies, not in detail, of all the policies they have written from 1971 to date.

MR. MELLOTT: Covering any contact whatever with Pennsylvania. Even if they claim the broker is the agent of the insured, I want to see that policy.

* * * * *

MISS D'AMATO: The problem we have in obtaining the policies — and it is in Mr. Bruckman's affidavit and I believe Mrs. Grace's affidavit that when the London insurers sign on the risk, they do that by numbers. The London insurers do not retain copies of the policies. The London broker has that policy. Therefore, ordering the excess insurers to get copies of these policies means that they had to go to over 150 London brokers and ask each broker to research his records for seven years.

THE COURT: Well, there is nothing wrong with that.

MISS D'AMATO: Your Honor, that is extremely burdensome. There are hundreds of thousands of documents.

THE COURT: But with form letters these days, you can put the information in the mail in a day with Xerox machines and address these companies.

* * * * *

THE COURT: I will go along with time for you. What time do you want? How much? Do you need 60 days? It seems to me you can get this out very quickly.

MR. WEIS: I don't see how we could possibly have it in 60 days.

MR. McCONNELL: Knowing a little bit about the insurance market, you wouldn't scratch the surface in complying with that order in 60 days.

* * * * *

MR. WEIS: Your Honor, could we start with 90 days, and if we run into trouble, we will come in.

THE COURT: Ninety days. If you run into trouble, I am sure Mr. Mellott is going to be reasonable.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,

Defendants.

Civil Action
No. 75-1567

(December 21, 1978,
1:30 o'clock p.m.)

(In Court Chambers)

THE COURT: All right, Mr. Bruckmann.

* * * * *

THE COURT: I will tell you what we're going to do. I can see that you haven't even made any effort to get this information up to this point. You are still in the preliminary stage of trying to assemble the various brokers, and what not, and you said you have to make appointments to see them, and things like that.

MR. BRUCKMANN: We have done that, your Honor.

THE COURT: Is there a fruition as a consequence? Have you actually contacted the brokers?

MR. BRUCKMANN: Yes, your Honor, we have contacted these — not the broker. We have contacted our clients and they told us that —

THE COURT: Who are the clients? You mean the 21 —

MR. BRUCKMANN: Each of the Defendant insurers. And they have pointed out the problems. They would have to review —

THE COURT: We're not talking about the problems they have. We want them to surmount their problems and get this information.

MR. BRUCKMANN: They have to review each placing slip individually.

THE COURT: Well, all right. How long is it going to take them to do this, to get the information?

MR. BRUCKMANN: There are four million placing slips for the period in time, your Honor.

THE COURT: You know, if you have a lot of different companies, it doesn't take long to look through that. You could look through a telephone book in a matter of a couple of days, and it would have a million names in it.

MR. BRUCKMANN: But each placing slip will have to be pulled individually, looked at, and then it may or may not — depending on the —

THE COURT: How long is it going to take you to do this? That is all I want. You told me you could do it. Nobody objected to it at the time.

MR. BRUCKMANN: Well, we did not know the extent of the files at that time, your Honor. And we are trying to comply by saying these documents are available for inspection.

* * * * *

THE COURT: All right, I will tell you what I am going to do. I am going to give you 60 days to get this information to Mr. Mellott, as you had promised. See, you promised to go ahead and do this. And if you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume, under Rule of Civil Procedure 37 B, subsection 2(A), that there is jurisdiction. That's what I am going to do.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,

Defendants.

Civil Action
No. 75-1567

PROCEEDINGS

of Findings of Fact and Order in the above-entitled action, April 19th, 1979, at Pittsburgh, Pennsylvania, by the Honorable Paul A. Simmons.

Appearances: *For The Plaintiff:*

CLOYD R. MELLOTT, Esquire
DALE HERSHEY, Esquire
DANIEL TOOLE, Esquire
DOUGLAS BURNS, Esquire

For The Excess Insurers:

THOMAS WEIS, Esquire
DAVID BECK, Esquire
MARK BRUCKMANN, Esquire

For Insurance Company of North America:

RANDALL MCCONNELL, Esquire
STEPHEN MLINAC, Esquire

Reported by:

DONALD D. HARRINGTON
Official Court Reporter

(In Open Court)

THE COURT: The Court will make the following findings of fact:

First, the Plaintiff, Compangnie [sic] des Bauxites de Guinee, hereinafter referred to as CBG, is a Delaware Corporation.

CBG is owned 49 per cent by the Government of Guinea and 51 per cent by the Halco Mining Company, a

Delaware Corporation which is licensed to do business in Pennsylvania. Halco, in turn, is owned by a group of six aluminum manufacturers domiciled in Europe and in North America. Two of the six aluminum companies (Aluminum Company of America and Martin Marietta Aluminum, Inc.) are United States Corporations. Aluminum Company of America is a Pennsylvania Corporation headquartered in Pittsburgh.

The sole business of CBG is the mining of bauxite ore, from which aluminum is made, in the Republic of Guinea.

The Court notes parenthetically that the law suit which has been filed in the British Isles admits that the principal business in conducted is the Republic of Guinea.

The Plaintiff, CBG, alleges, and the Defendanat, Insurance Company of North America (One of the Defendants herein) admits that the CBG principal place of business is outside the territorial limits of the United States. The Court expressly finds that CBG is not an alien corporation inasmuch as the said corporation is a Delaware Corporation.

The Defendant Insurance Company of North America is a Pennsylvania Corporation, having its principal place of business in Pennsylvania. The Court notes that the Insurance Company of North America does not challenge the in personam or subject matter jurisdiction of this court.

The remaining 21 insurance companies who are the Defendants in this case do business in the London insurance market and, also, they do business in various parts of the world, including the United States, and including

Pennsylvania. They are hereinafter referred to as the Excess Insurer Defendants, or the Excess Insurers.

Of the 21 Excess Insurers, 5 are English companies representing English domestic interests but insuring risks throughout the world, particularly in Pennsylvania. Seven are English companies which represent non English parents, or affiliates. The United States, Japan and Israel are the nationalities of two each of the Excess Insurer Defendants. Switzerland and the Republic of Ireland are the nationalities of one each of the Excess Insurer Defendants. The remaining Excess Insurer Defendant is a Belgium Company which represents the United States parent.

Now, the Court finds that all of these companies have been and are doing business in the United States and, more particularly, in the Commonwealth of Pennsylvania.

The Defendant INA issued insurance policy number 71HF1195 to CBG covering business interruption losses occurring at CBG's facility in Guinea for the period commencing February 12th, 1974. The policy provided coverage on an all-risk basis for losses up to 10 million dollars each and every loss. The insurance policy was issued in Pennsylvania, was delivered to the Plaintiff, CBG, by Marsh & McLennan, an insurance brokerage firm, with a letter dated July 11, 1974. The Excess Insurer Defendants agreed to provide business interruption coverage to CBG for a period of 12 months after February 12th, 1974 covering losses of 10 million dollars in excess of the 10 million covered by INA for each and every loss.

The Excess Insurer Defendants did not issue a policy to CBG in connection with the aforementioned underwriting; however, they do not deny they agreed to provide the coverage, and it has been agreed that they adopted the terms of the underlying INA policy, which policy was written by a Pennsylvania Corporation.

Marsh & McLennan delivered a "cover note" to CBG in Pittsburgh with its letter of June 11, 1974, accompanied by the INA policy. The "cover note" informed CBG that the excess coverage had been placed with the Excess Insurer Defendants on the same terms as the coverage provided by INA.

On December 11th, 1975 CBG commenced this action against INA and the Excess Insurer Defendants alleging the Defendants are liable under the insurance contracts because the covered business interruption losses were suffered due to incidents which occurred in Guinea while the insurance contracts were in effect.

This Court has in personam jurisdiction over the Defendant INA, and this Court has in personam jurisdiction over the 21 Excess Insurer Defendants.

The Excess Insurers agreed to stipulate that they derived at least one per cent of their premium income from Pennsylvania. Even though this proposed agreement was never taken up, the Court will deem it to be an admission.

The Excess Insurers provide coverage to various types of citizens of Pennsylvania. They cover risks located in Pennsylvania and they provide coverage through brokers having offices in Pennsylvania.

To show the full extent of the business done by the Excess Insurers connected with Pennsylvania, this Court, on July 27th, 1978, ordered the Excess Insurers to produce all insurance contracts which they had written since 1971 in which they provided coverage to Pennsylvania insureds, including Pennsylvania risks, or provided coverage through Pennsylvania brokers.

The Excess Insurers, through their attorneys, promised on several occasions to comply with this Court's order, and obtained extensions of time in order to comply. The Excess Insurers produced only a few of the insurance contracts requested, and under the circumstances the Court feels that the Excess Insurers have not offered the necessary assistance to the various brokers in gathering documents and getting the requested information which would be necessary under the circumstances.

This Court, after some months of further delay, on December 21st, 1978, stated that if the Excess Insurers were to fail to produce the requested information within 60 days from that date, the insurance contracts, which were subject to its order of July 27, 1978, and showing the extent of the business contacts with Pennsylvania, that this Court would impose a sanction consisting of a finding that the Excess Insurers are subject to the in personam jurisdiction of this Court because of their business contacts in Pennsylvania.

This Court has considered an affidavit: namely, Plaintiff's Exhibit 5 submitted in this case. The Court has looked through the voluminous documents and papers in this case, and the Court finds, as a fact, that the material promised this Court by the Excess Insurers on December 21st, 1978, and prior to that time on July 27th, 1978, have not —this material has not been forthcoming, and the Court, at this point, will rule and impose a sanction, and does find that the Excess Insurers are, in fact, subject to the in personam jurisdiction of this court.

The Court further finds that the underlying insurance contract furnished by INA, by implication, by its terms includes and covers the Excess Insurers, and the Court finds that as a term of the underlying insurance of INA that the Excess Insurers agreed to submit to this

Court's jurisdiction, in personam jurisdiction. And the Court finds that that is a second ground for the exercise of this Court's jurisdiction, and also as a further foundation for this Court's holding that this Court, in fact, does have in personam jurisdiction.

The Court further finds that under the admitted facts and known facts, that the Excess Insurers are, in fact, doing business in Pennsylvania and that they derive profits from the writing of insurance coverage connected with Pennsylvania; more paricular, they wrote the policy in question knowing that it would be sent to Pennsylvania and that money would be forthcoming from sources in Pennsylvania. And the Court, under those circumstances, invokes the Pennsylvania Long-Arm Statute, which further substantiates this Court's ruling that this Court does, in fact, have in personam jurisdiction.

On March the 22nd, 1979, the Excess Insurer Defendants instituted suit against CBG in the High Court Of Justice in the Queen's Bench Division, the Royal Courts Of Justice, at 1979-I Number 1727, in London, England. In that suit, they sought a declaration that they are entitled to avoid the contract of insurance and, further, an order that the contract of insurance is avoided on the ground of a material non-disclosure.

This Court notes that in the pleading in this case that the 6th defense of the Defendant Excess Insurers' Amended Complaint substantially raises the same identical questions, that is, as to whether or not there was a material non-disclosure of prior damage to the tippler building of the Plaintiff, which building is situated in the Republic of Guinea, and whether or not the knowledge of this prior damage, if known to the Plaintiff, should have been disclosed to the Excess Insurers.

The Court finds that the circumstances and the substance of the litigation in London is substantially identical in all respects to the litigation now before this Court.

The Court finds as a fact that the action of the Excess Insurers in prosecuting litigation in London, England, which is substantially identical with the litigation now before this Court, is a duplicate litigation. And the Court further finds that all parties, including the Excess Insurers, will suffer irreparable harm if this action is allowed to persist wherein litigation which is substantially identical will be prosecuted in two different courts on two different continents involving the same subject matter and the same defenses, and also the same insurance contract which is now before this Court.

This Court concludes as a matter of law that it has, in fact, in personam jurisdiction over all of the Defendants, including INA and the 21 Excess Insurers.

The Court finds as a matter of law that it should impose a sanction on the 21 Excess Insurers for failing to produce the requested documents that would have disclosed the extent of their business contacts in Pennsylvania with Pennsylvania businesses. And the Court finds under the applicable Rules of Federal Civil Procedure that this Court can, and does, impose the sanction: and for the purpose of this litigation the Excess Insurers are subject to the in personam jurisdiction of this Court due to their business contacts with Pennsylvania.

The Court also heretofore mentioned, and will mention again, that it finds as a matter of law that the Pennsylvania Long-Arm Statute brings the Excess Insurers before this Court.

The Court also finds that this Court has jurisdiction by virtue of the diversity of the parties and the fact that this matter is concerning a subject matter of a value much in excess of the sum of 10 thousand dollars.

This Court finds that in personam jurisdiction is also grounded, as a matter of law, on the fact that the Defendants have derived profit out of Pennsylvania (however small) and that, admittedly, this contract consisted of a coverage and risk which were written through Pennsylvania brokers and the monies involved in paying for the coverage came from Pennsylvania brokers, and from Pennsylvania, to the several named Excess Insurers.

The Court further finds in personam jurisdiction because it's a matter of common business usage and common business practice for an insurer under these circumstances, underwriting for the business situation here present, that INA, in its policy of insurance, agreed to submit to the jurisdiction of this United States and to designate the Insurance Commissioner of Pennsylvania as agent for the service of process; and the Court finds that such a concession by the Excess Insurers to this jurisdiction was implied under the terms of the insurance contract which was provided via the business interruption coverage for the Plaintiff, CBG.

The Court finds that it would be inequitable, inefficient and unfair to require CBG to defend two law suits involving substantially the same issues, same defenses, same insurance, in two different courts and on two different continents.

The Court finds that it would be inequitable and oppressive for them to participate in duplicate law suits, as here and above mentioned, under these circumstances.

[colloquy with counsel omitted]

The Court finds that the commencement of the separate action in England while the present action is pending before this Court is oppressive, unfair, and an act of bad faith under all of the circumstances.

This Court finds that it has the authority to preserve its jurisdiction and prevent duplicate litigation under these circumstances. And the Court may do so by enjoining the Excess Insurers from further commencing or prosecuting or maintaining the action, that we have here and above referred to, in the English Courts.

This Court has the jurisdiction to order that the Excess Insurers be preliminarily enjoined from further maintaining or prosecuting or in any way participating in the action here and above referred to as a suit instituted against CBG in the High Court Of Justice, Queen's Bench Division, Royal Courts Of Justice, at 1979-I, Number 1727 in London, England.

And the Court further finds that the evidence as presented, in its entirety, indicates that the facts heretofore found by this Court are certain of proof at a final hearing in this matter.

The Court finds, as a consequence, the probability of success on the part of the Plaintiff, CBG, in showing what has transpired can be proved.

The Court finds that the Plaintiff, CBG, would suffer irreparable harm if a preliminary injunction is not granted in this case.

It further is a finding of the Court that there have been several questions of law here raised, which are serious questions, and these questions are the proper subjects of this Court's consideration and make them a fair ground for determination by this Court as the United States District Court for the determination of said questions concerning in personam jurisdiction and other matters which this Court has discussed.

The Court finds that the balance of hardship under the facts of this case, and in light of the law as the Court has found it to be, decidedly tips the balance of hardship in favor of CBG and requires that we grant CBG the preliminary relief requested.

And the Court will now making the following order:

AND NOW this 19th day of April, 1979, upon consideration of the Plaintiff's Motion For Preliminary Injunction, and after hearing the arguments of counsel and the evidence as presented, it is hereby ORDERED that the Excess Insurer Defendants, their attorneys, employees and agents shall immediately, upon service of this Order, discontinue any further prosecution of the suit instituted by them in the High Court of Justice, Queen's Bench Division, 1979-I-No. 1727, that the Excess Insurer Defendants, their attorneys, employees and agents shall desist from filing any other actions against Compangnie [sic] des Bauxites de Guinee relating to issues and matters now before this Court during the pendency of the present action in this Court; that service of this Order shall be deemed to be effective upon delivery of a copy of the Order to the Pittsburgh counsel of the Excess Insurers; that supplementary service of the Order may be made by the delivery of copies of this Order to the London offices or the London counsel of the Excess Insurers by any competent adult; and that the Excess Insurer Defendants shall reimburse the Plaintiff for its costs, not including reasonable attorney's fees, that is, for expenses of traveling, and so forth, incurred in the prosecution of this present Motion and incurred in responding to the aforementioned action filed by the Excess Insurers in the High Court of Justice, London, England.

A hearing on a permanent injunction in this matter will be held in this court room on June the 25th at 9:30.

No further notice will be given.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSUARANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,

Defendants.

Civil Action
No. 75-1567

ORDER

AND NOW, this 25th day of June, 1979, upon consideration of the Plaintiff's motion for continuance of the hearing on the permanent injunction, and after hearing the arguments of counsel for all parties, it is hereby ORDERED that:

1. The hearing on the permanent injunction now scheduled for August 8, 9, and 10, 1979, shall be continued until a date, to be specified by further order of Court, following the determination by the United States Court of Appeals for the Third Circuit of the appeal of this Court's preliminary injunction order dated April 19, 1979.

2. The subject matter of the hearing on the permanent injunction shall be whether a permanent injunction should issue directing the Excess Insurer Defendants to desist from prosecuting the suit which they have filed against the Plaintiff herein in London. At that hearing, the Court will not receive further evidence on the questions of the Court's in personam jurisdiction over the Excess Insurer Defendants or subject matter jurisdiction over this controversy, those issues having been determined in this Court's ruling of April 19, 1979.

Paul A. Simmons
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,
Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD.,VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,
Defendants.

Civil Action
No. 75-1567

ORDER

AND NOW, to-wit this 25th day of June, 1979, upon consideration of Plaintiff's Motion for a Protective Order, and after hearing the arguments of counsel, it is hereby ORDERED that the issues of in personam jurisdiction and subject matter jurisdiction, having been determined by this Court in favor of the Plaintiff and against the Excess Insurer Defendants after extensive briefing, oral argument and the presentation of evidence, shall not be the subject of further discovery, testimony or evidence in this case, and it is further ORDERED that the depositions noticed by the Excess Insurer Defendants to commence in London on July 9, 1979, shall not commence until one week following the service of interrogatory answers and the production of documents by the Excess Insurer Defendants as ordered by this Court on June 14, and 15, 1978.

PAUL A. SIMMONS
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, PRUSSELS, All being corporations,

Defendants.

Civil Action
No. 75-1567

PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER IN RE PERMANENT INJUNCTION

I. Preliminary Statement

The issue addressed herein is whether this Court should issue a permanent injunction against the excess insurer defendants prohibiting them from continuing to prosecute the duplicative action which they have filed against the plaintiff in England.

II. Findings of Fact In Re Permanent Injunction

A. The parties and others involved

1. Plaintiff, Compagnie des Bauxites de Guinee, hereinafter abbreviated "CBG", is a Delaware Corporation.

2. CBG is owned 49% by the Republic of Guinea and 51% by Halco (Mining) Inc., hereinafter abbreviated "Halco", a Delaware Corporation, which is licensed to do business in Pennsylvania, and which has its offices at Two Allegheny Center, Pittsburgh, Pennsylvania.

3. Plaintiff has entered into contracts with Halco whereby Halco has performed certain administrative services for plaintiff, including the procurement of insurance, from its office in Pittsburgh.

4. Plaintiff's principal place of business is in the Republic of Guinea, West Africa.

5. Plaintiff is not licensed to do business in the Commonwealth of Pennsylvania.

6. Plaintiff maintains no place of business in the Commonwealth of Pennsylvania.

7. Plaintiff maintains no place of business anywhere in the United States of America.

8. Plaintiff does not do any business in Pennsylvania or elsewhere in the United States.

9. Plaintiff does not maintain any place of business nor do any business in England.

10. Defendant, Insurance Company of North America, hereinafter abbreviated "INA", is a Pennsylvania Corporation having its principal place of business in Philadelphia.

11. The defendants other than INA are twenty insurance companies which write insurance in the London market and one insurance company, L'Union Atlantique S.A. d'Assurances, hereinafter abbreviated "UNAT", which writes insurance in Brussels. Said twenty-one defendants will be referred to as "the excess insurer defendants".

12. The excess insurer defendants are incorporated in the following countries:

Defendant	County of Incorporation
The Insurance Corporation of Ireland Ltd.	Ireland
Eagle Star Insurance Co. Ltd.	England
Hanover Insurance Company	New Hampshire, U.S.A.
Continental Assurance Company of London Ltd.	England
The Century Insurance Co. Ltd.	Scotland

Defendant	County of Incorporation
Yuval, The Insurance Company of Israel, Ltd.	Israel
Home Insurance Company (doing business in England as Home Insurance Co. Ltd.)	New Hampshire, U.S.A.
Slater Walker Insurance Co. Ltd.	England
Yasuda Fire & Marine Insurance Co. (UK) Ltd.	England
Nichido Fire & Marine Insurance Co. Ltd.	Japan
Turegum Insurance Company	Switzerland
Sahar Insurance Co. Ltd.	Israel
Excess Insurance Co. Ltd.	England
Trident Insurance Co. Ltd.	England
Vesta (UK) Ltd.	England
Chiyoda Fire & Marine Insurance Co. Ltd., Tokyo	Japan
Stronghold Insuance Co. Ltd.	England
British Reserve Insurance Co. Ltd.	England
English and American Insurance Co. Ltd.	England
Consolidated Europen [sic] Reinsurance Co. Ltd.	England
L'Union Atlantique S.A. d'Assurances, Brussels	Belgium

13. None of the excess insurer defendants has maintained an office in Pennsylvania.

14. None of the excess insurer defendants has been licensed to do business in Pennsylvania except the following:

Eagle Star Insurance Co. Ltd.	licensed in Pa. until 1978
Hanover Insurance Co.	licensed in Pa.
Home Insurance Co.	licensed in Pa.
Turegum Insurance Company	licensed in Pa. for surplus lines only
Excess Insurance Company	licensed in Pa. for surplus lines only
English & American Insurance Co. Ltd.	licensed in Pa. for surplus lines only.

15. In addition to the twenty-one excess insurer defendants named in finding No. 12, Mercantile & General Reinsurance Co., Ltd., hereinafter abbreviated "Mercantile & General", a corporation incorporated in England and engaged in the insurance business in the London market, was named as a defendant.

16. At some time in 1976, prior to October 26, defendant, The Insurance Corporation of Ireland Ltd., hereinafter abbreviated "ICI", assumed the obligations of Mercantile & General with respect to the excess insurance involved in this action.

17. On October 26, 1976, defendant Mercantile & General was removed from this action and the caption was amended to delete its name.

18. Marsh & McLennan, Inc., hereinafter abbreviated "Marsh & McLennan", has been and is an insurance brokerage concern having offices in Pittsbugh, New York and elsewhere.

19. Bland Payne Company, formerly named Bland Welch & Co. Ltd., hereinafter abbreviated "Bland Payne", has been and is an insurance brokerage concern incorporated in England and engaged in the insurance brokerage business in the London market. It is a Lloyds broker.

B. Events

(a) The Property

20. Prior to 1973, Plaintiff developed and caused to be constructed a mine, railway and processing plant in the Republic of Guinea, West Africa, for the mining, transporting, processing and exporting of bauxite ore. Some of the facilities, in particular, the railway and the port were developed and caused to be constructed by L'Office d'Amenagement de Boke, hereinafter abbreviated "OFAB". This project has been referred to as "The Boke Project".

21. The property in Guinea related to the present action consisted of a bauxite mine at Sangaredi, a railway from Sangaredi to Kamsar, and a processing plant and loading wharves at Kamsar.

22. Plaintiff has been granted certain mining rights by the Government of Guinea to extract bauxite ore in a specified area of Sangaredi. Plaintiff has owned the facilities at Kamsar which crush, dry and store bauxite and which load bauxite into ships. These facilities are hereinafter termed "the processing plant". OFAB has owned the loading wharves at Kamsar.

23. Commercial operations at the Boke project were begun in 1973, although some of the facilities were in operation before that year.

(b) The Insurance

24. In July on August of 1973, Halco, acting on behalf of Plaintiff, instructed Marsh & McLennan to obtain for Plaintiff business interruption insurance covering its operations in Guinea.

25. The amount of such business interruption insurance ultimately requested was $20,000,000.

26. Marsh & McLennan, acting on behalf of plaintiff, requested Bland Payne to obtain business interruption insurance for plaintiff in the London market.

27. In late January and in February, 1974, Bland Payne presented to the excess insurer defendants except for UNAT and to Mercantile & General a placing slip in the amount of $10,000,000, in excess of the first $10,000,000. Said excess insurer defendants (except for UNAT) and Mercantile & General initialed said placing slip, effective February 12, 1974, indicating the part of said $10,000,000 each was willing to insure. A copy of said placing slip, without all the signatures, has been marked defendants' Exhibit "1a".

28. Effective February 12, 1974, UNAT initialed a placing slip sent to it by Bland Payne and returned it to Bland Payne. A copy of said placing slip has been marked defendants' Exhibit "1b".

29. On April 10, 1974, Bland Payne issued in London, and sent to Marsh & McLennan in Pittsburgh, Bland Payne's cover note, and Marsh & McLennan duly delivered said cover note to Halco. A copy of said cover note is attached to Exhibit "2" to the Complaint in the present action.

30. Said cover note recited that Bland Payne had effected business interruption insurance for plaintiff in the amount of $10,000,000, in excess of $10,000,000 with

insurance companies listed on an attachment to the cover note. Said attachment listed the excess insurer defendants and Mercantile & General and specified the percentage of the excess $10,000,000 which each of them had agreed to insure.

C. The American Action

(a) The Pleading and Motions

31. On December 11, 1975, plaintiff filed the present action in two counts, the first against INA on its business interruption insurance Policy No. 71 HF1195 (finding No. 24 supra), and the second against the excess insurer defendants and Mercantile & General on Bland Payne's cover note (finding No. 30 supra), alleging losses to plaintiff from interruption to its business, reducing its output of Bauxite, as the result of failures sustained by the pan feeders and crusherhouse at plaintiff's processing plant at Kamsar during 1974, subsequent to February 12, 1974.

32. Service was made upon the insurance commissioner of the Commonwealth of Pennsylvania, who sent copies of the summons and complaint by certified mail to the Excess Insurer defendants in London and Brussels.

33. In this action CBG alleges that INA and the Excess Insurers agreed to provide all risk business interruption insurance coverage to CBG for certain facilities in Guinea up to $20,000,000 for each loss, that the first $10,000,000 of coverage was written by INA, and the excess layer of $10,000,000 of coverage was written by the Excess Insurers, that while this insurance was in effect in 1974, an incident occurred involving the crusherhouse or the tippler/crusher building which led to a business interruption loss in excess of $10,000,000, and that the loss was covered by the insurance, but the defendants

have refused to indemnify CBG in accordance with the insurance contract.

34. The said INA policy involved in this action is Policy No. 71HF1195, effective as of February 12, 1974, covering certain business interruption losses suffered by CBG up to $10,000,000 for each loss. The INA policy was issued in Philadelphia and was delivered to CBG in Pittsburgh.

35. The Excess Insurers did not issue or execute a policy of their own, but they did execute a placing slip in which they agreed to provide coverage on the same terms and conditions as the underlying INA policy, except that their coverage would be for each loss of $10,000,000, in excess of the underlying $10,000,000 covered by INA.

36. In their Answer filed December 31, 1975, and Amended Answer filed February 17, 1976, the Excess Insurer defendants raised among others the following defenses:

a) Notice of loss was not given, and sworn proof of loss was not submitted within the time required.

b) The alleged loss was not covered by the insurance underwritten.

c) Suit was not filed within the time required.

d) The Court lacks jurisdiction of the subject matter of the action.

e) The Court lacks jurisdiction over the Excess Insurer defendants.

f) The primary damages to the pan feeders and crusher house occurred before the effective date of the insurance and the alleged loss is therefore not covered.

g) The prior damage to the property in question was not revealed by plaintiff to the Excess Insurer defendants prior to or at the placing of the coverage, which serves to eliminate coverage for the loss.

h) The alleged damage to the pan feeders and crusher house was expressly excluded from the coverage.

37. The Excess Insurers filed an Amended Answer on February 17, 1976. In the Amended Answer they challenged this Court's in personam jurisdiction and venue, and they defended themselves on the merits.

38. Among the defenses raised by the Excess Insurers in their Amended Answer was also the defense of nondisclosure. In paragraph 28 of the Amended Answer, the Excess Insurers aver that "prior damage to the property in question was not revealed by the plaintiff to the defendants prior to or at the time of the issuance of the said Policy No. 71HF1195 and cover note, all of which is contrary to the terms, conditions and provisions of the said policy and cover note and all of which serve to eliminate coverage for the alleged loss."

39. On May 20, 1977, the Excess Insurers filed a Motion for Summary Judgment with supporting affidavits. In that Motion seventeen of the twenty-one Excess Insurers alleged a lack of in personam jurisdiction and all twenty-one sought dismissal on the ground of forum non conveniens. After receiving further affidavit and briefs and after receiving evidence and hearing oral argument, the Court denied the Motion for Summary Judgment on April 19, 1979 and confirmed its ruling in an Order dated June 25, 1979.

40. On January 29, 1979, the Excess Insurers filed a second Motion for Summary Judgment. In that Motion

the Excess Insurers challenged the Court's subject matter jurisdiction by alleging a lack of diversity between CBG and INA. INA did not join in the Motion. The Court denied this second Motion for Summary Judgment on April 19, 1979, and confirmed its ruling in an Order dated June 25, 1979.

(b) Plaintiff's Discovery on Personal Jurisdiction over Excess Insurance Defendants.

41. On August 9, 1976, plaintiff served, and on November 19, filed, its first request for documents to each defendant calling in paragraph 7 for, inter alia, "copies of all business interruption insurance policies issued by defendant during the period from January 1, 1972 to December 31, 1975."

42. After the Excess Insurer defendants had on January 24, 1977, objected to producing such policies on grounds of burdensomeness, plaintiff on May 12, 1977, filed a Motion to Compel their production.

43. On June 15, 1978, the Court orally overruled the Excess Insurer defendant's objections and limited other requests to an extent not material to the present controversy.

44. On July 14, 1978, plaintiff served and filed a second request for production of documents by the Excess Insurer defendants seeking "all cover notes and/or insurance policies wherein the Excess Insurer defendants participated as an insurer . . . which . . . were delivered in . . . Pennsylvania . . . or covered a risk located in . . . Pennsylvania." This second request thus asked for part of the documents covered by the first request (finding No. 41 supra), which the excess insurer defendants were already required to produce (finding No. 43, supra).

45. After the Excess Insurer defendants had on July 17, 1978, objected to plaintiff's second request for documents on the ground, inter alia, that they were not in said defendants' possession, custody or control, but were in plaintiff's possession, custody and control. The Court on July 27, 1978, heard argument, and, on being told that the policies were kept by the brokers in London, ordered the Excess Insurer defendants to request them from the brokers. The Court limited them to the period from 1971 to date.

46. On November 24, 1978, the Excess Insurer Defendants served and filed an affidavit offering to make their records, alleged to require review of approximately 4,000,000 files, available at their offices in London for inspection by plaintiff.

47. On November 27, 1978, plaintiff served and filed a Motion to Compel the Excess Insurer defendants to produce the documents relating to their Pennsylvania business since 1971.

48. On December 21, 1978, the Court held a status conference and, after hearing argument, gave the Excess Insurer defendants an additional sixty (60) days to produce the insurance policies which were in the possession of the brokers in London, stating that the Court would assume that he had jurisdiction over defendants unless they produced "statistics and other information in that regard that would indicate otherwise."

49. On February 20, 1979, the Excess Insurer defendants filed copies of their letters to the London brokers asking for the information concerning insurance business written for risks or insureds in Pennsylvania or emanating from Pennsylvania brokers, and copies of the brokers' answers, most of which state that they cannot

extract from their voluminous files the documents requested.

50. On February 23, 1979, plaintiff filed a Motion for an Order denying the Excess Insurer Defendants' Motion to Dismiss for lack of personal jurisdiction over them.

(c) Other Discovery

51. Beginning February 28, 1978, counsel for plaintiff and counsel for defendant INA took a number of depositions of witnesses in Pittsburgh, New York, London and Brussels.

52. Counsel for the Excess Insurer Defendants appeared at said depositions pursuant to orders of court entered February 17, and July 16, 1978, providing that by so doing they did not waive their objections to the jurisdiction of the court or other grounds for dismissal made in their Motion filed May 20, 1977.

53. On November 20 and 21, 1978, counsel for INA took the deposition of Leonard Jacob, Jr., who had been resident manager for plaintiff in Guinea from 1971 until at least 1977.

54. Mr. Jacob testified that problems developed in the pan feeder system and tippler/crusher system in 1973, well before February 12, 1974, the effective date of the business interruption insurance at issue in the present action.

D. The English Action

55. On March 22, 1979, over three years after this subject action was commenced, the Excess Insurers commenced suit against CBG in the High Court of Justice, Queen's Bench Division, at 1979 I No. 1727. In that suit they seek a declaration that they are entitled to avoid the contract of insurance with CBG and Order that the con-

tract of insurance is avoided on the ground of material nondisclosure.

56. In the statement of claim filed in the English action, the Excess Insurers allege that prior to the underwriting they were not told facts which would have shown that the underwriters would be subject to suit in the United States and that they were not told that "from about the beginning of October, 1973, serious problems had developed in the tippler/crusher system at Kamsar which were substantially affecting production."

57. Since at least December 1975, the Excess Insurers have known the facts which they allege in the English action to have been undisclosed prior to the underwriting. The basis for United States jurisdiction over them is asserted in the Complaint. Their Amended Answer shows their awareness of alleged problems with the tippler/crusher system. Nonetheless, they delayed until March 22, 1979, to file the English action which is based upon their allegedly recent discovery of these facts.

58. CGB [sic] does not trade or reside within the jurisdiction of English courts. The Excess Insurers do not allege that CBG derives profits out of England. Nonetheless, the English court authorized the Excess Insurers to serve CBG with process at its statutory office in Dover, Delaware.

E. Duplication in the Two Suits

59. The English action duplicates the American action in that it involves the same parties as Count II of the present case.

60. The English action involves the same insurance contract as that involved in the American action.

61. The English action involves the same subject matter as that involved in the American action.

62. The Excess Insurers take the position in both the English action and the American action that the insurance contract is unenforceable against them because of alleged nondisclosures.

63. In the English action the Excess Insurers seek a "declaration that they are entitled to avoid the Contract of Insurance"; in the American action the Excess Insurers defend on the ground that coverage is "eliminated" because alleged facts were not revealed.

64. The same proof would be required in both the English action and the American action. The Excess Insurers, in both actions, would have to prove that prior to the underwriting certain incidents occurred in Guinea, that those incidents were material to the underwriters, and that they were not told and had no reason to know of the incidents. CBG, in both actions, might present evidence to the contrary on all of these points.

65. The English action, filed on March 22, 1979, duplicates the present action which has been pending in this Court since December 11, 1975.

66. It would be vexatious and harassing to CBG to be forced to litigate regarding the same subject matters in two forums.

67. Further prosecution of the English action would result in economic waste and irreparable injury to CGB [sic].

68. In the English action the case would not be heard by a jury, whereas the Ameican [sic] action involves a jury trial, which was initially sought by CBG.

69. In the English action, the Court is asked to deal only with the issue of nondisclosure, which is one of the issues before this Court in the American action. INA is not a party to the English action. The English Court does not have before it all of the parties, claims and defenses which make up the entire controversy among the parties, as shown by the pleadings and discovery in the American action. Therefore, the complete dispute can be considered and disposed of only in the present case before this Court, not in the English action.

70. The English action represents an attempt by the Excess Insurers to subvert and avoid this Court's jurisdiction, to vex and harass CBG, to deny CBG its rights under the Constitution of the United States, to cause CBG irreparable injury and to have their home forum try issues which have been raised or could have been raised in the action before this Court. Consequently, it must be found that the English action was commenced in bad faith.

III. Conclusions of Law In Re Permanent Injunction

1. This Court has in personam jurisdiction over the Excess Insurers.

Source: Orders of April 19, 1979, and June 25, 1979, which are the law of the case. This Court determined that it has in personam jurisdiction over the Excess Insurers after receiving nine briefs, some thirty-seven affidavits from the Excess Insurers, two days of evidence presented at a hearing, and three oral arguments dealing with the subject. The Court based its finding of in personam jurisdiction on the Pennsylvania long arm statute, on the fact that the Excess Insurers derived profits out of Pennsylvania, on the fact that the Excess Insurers adopted a Pennsylvania insurance contract, on the fact that the Excess Insurers have frequently as a matter of practice authorized the Pennsylvania Insurance Commissioner to accept service of suit in their behalf, on the fact that they have submitted to the jurisdiction in this case, and, as a matter of sanction, on the fact that they failed to produce documents relating to their Pennsylvainia business after being repeatedly ordered to do so by this Court.

2. This Court has the power to enjoin parties within its jurisdiction to desist from prosecuting in other Courts suits which are vexatious and duplicative of actions before this Court.

> (See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 3-7 and authorities cited therein.)

3. The Court's power to enjoin parties from prosecuting duplicative suits includes the power to enjoin further prosecution of suits commenced in other countries, and especially since the litigation in the above-captioned case was begun over four and one half years ago.

> (See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 3-4, and authorities cited therein.)

4. As a matter of law, the English action is duplicative, vexatious, harassing and results in irreparable injury to CBG, and CBG has no other adequate remedy, except injunctive relief.

> (See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 7-11, and authorities cited therein)

5. In the interests of justice and in light of the foregoing findings of fact the Excess Insurers must be enjoined permanently from further prosecuting the Eng-

lish action and any other action which duplicates matters and issues invoved [sic] in the present case before this Court.

IV. Permanent Injunction Order

AND NOW, this 5th day of AUGUST, 1980, in consideration of evidence and arguments presented at hearings before this Court on April 18 and 19, 1979, November 5, 6 and 7, 1979, and April 8, 1980, and in consideration of the Court's findings that the suit instituted by the Excess Insurer Defendants (being all of the defendants with the exception of Defendant Insurance Company of North America) in the High Court of Justice, Queen's Bench Division at 1979-I-No. 1727, over whom this Court has in personam jurisdiction, is duplicative of the present action before this Court, involving the same parties, the same subject matter, the same issues and the same evidence as the case before this Court, and that Plaintiff wouid suffer irreparable injury if it were forced to litigate both actions simultaneously, and that the interests of justice require that the Excess Insurer Defendants be enjoined from prosecuting the aforementioned suit which they have commenced in London; and adopting and incorporating herein the findings of fact and conclusions of law made by this Court on April 19, 1979; and further adopting and incorporating herein the findings of fact and conclusions of law hereinabove made and entered by this Court simultaneously with the entry of this Order; IT IS HEREBY ORDERED that the Excess Insurer Defendants, their respective attorneys, employees and agents, and each of them, desist from and discontinue any further prosecution of the suit instituted by them in the High Court of Justice, Queen's Bench Division, at 1979-I-No. 1727, and that they desist from filing any other actions in any Court relating in any manner to issues and matters in this action before this Court during the pendency of the present action, and that services of the Order shall be effective upon delivery of a copy of this Order to the Pittsburgh counsel of the Excess Insurer Defendants, and that supplementary service of this Order may be made by the delivery of copies of this Order to the London solicitors of the Excess Insurer Defendants by any competent adult; and that the preliminary injunction entered on April 19, 1979, shall be in full force and effect as to each Excess Insurer Defendant until that Defendant is effectively served with this permanent injunction Order.

PAUL A. SIMMONS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,

Defendants.

Civil Action No. 75-1567

PRELIMINARY STATEMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER IN RE FORUM NON CONVENIENS

I. Preliminary Statement

The issue now addressed by this Court is whether the Court would dismiss the action against the Excess Insurer Defendants on the ground of forum non conveniens.

II. Findings of Fact in re Forum Non Conveniens

1. Findings of fact 1 through 70 inclusive heretofore made this day in regard to the matter of the permanent injunction are incorporated herein and made a part hereof by reference.

2. This case has been pending before this Court since December 11, 1975, almost four years. It is one of three cases brought by CBG on a business interruption insurance contract, all three of which are pending before this Court.

3. The Excess Insurers filed an Answer on December 31, 1975, and an Amended Answer on February 17, 1976, both of which are very extensive, but neither of which raised the forum non conveniences [sic] argument.

4. All of the grounds set forth by the Excess Insurers as a basis for forum non conveniens dismissal were known to the Excess Insurers in December 1975, prior to the filing of their Answer, those grounds being the possible application of English law and the location of witnesses in England who might testify as to nondisclosure and notice, which are two of the many issues in the case.

5. The Excess Insurers did not raise the forum non conveniens argument until they filed their Motion for

Summary Judgment on May 20, 1977, some seventeen months after the action was commenced and they received notice of the suit. After they raised the forum non conveniens argument, they did not press it but stressed their argument, contained in the same Summary Judgment Motion, that the Court lacked in personam jurisdiction over seventeen of them. The Court denied the Motion for Summary Judgment on April 19, 1979, and confirmed its ruling in an Order dated June 25, 1979.

6. On October 22, 1979, they filed a Motion to Dismiss on the ground of forum non conveniens. In their Motion they imply but do not expressly state that London would be a more convenient forum than Pittsburgh. They do not allege that injustice would result if the base were tried in Pittsburgh. Nor do they allege that the Plaintiff chose Pittsburgh as the place for filing the action merely to vex or harass them.

7. The jurisdictions having some connection with this case are Pittsburgh, Philadelphia, Guinea, Brussels and London. The jurisdiction having the most connection and being the most convenient forum for all parties is Pittsburgh, particularly in light of the location of parties, witnesses, documents and counsel, and in light of the length of time that the matter has been pending before this Court and this member of the Court.

8. This case (which is also described in findings 1-70, submitted previously), involves a claim under business interruption insurance coverage in excess of $10,000,000. The claim made by CBG is for losses resulting from an incident involving its facilities in Guinea.

9. INA and the Excess Insurers deny coverage on a variety of grounds, some of which deal with the causes and results of the incident in Guinea. Facts and wit-

nesses regarding that incident are to be found in Pittsburgh and Guinea.

10. The insurance was placed in Pittsburgh by a Pittsburgh insurance broker and was paid for in Pittsburgh.

11. The underlying INA policy and the cover note evidencing coverage by the Excess Insurers were delivered to CBG in Pittsburgh.

12. The insurance was requested in Pittsburgh on behalf of CBG by Halco (Mining) Inc., which by contract provides certain services for CBG, including the procurement of insurance.

13. Halco (Mining) Inc. is a Delaware corporation, registered to do business in Pennsylvania, having its principal office at Two Allegheny Center in Pittsburgh. Halco (Mining) Inc. is a 51% shareholder in CBG, the other 49% being owned by the Government of Guinea.

14. All parties, including the Excess Insurers, have initiated and enagaged in discovery in the United States and abroad in preparation for the eventual trial of the case in Pittsburgh.

15. All of the witnesses identified in the Excess Insurers' Motion to Dismiss as being material defense witnesses have given testimony at the request of the Esxcess Insurers in London for use at the trial of the case in Pittsburgh. The testimony was taken as trial testimony, with the Excess Insurers' counsel first examining on direct and plaintiff's counsel then cross examining. The depositions of the Excess Insurer underwriterrs were noticed by their own counsel and thus were clearly taken for the purpose of making their testimony available at the trial in Pitsburgh [sic] without bringing all of the witnesses here in person.

16. In addition to the twenty-four Excess Insurer deponents who testified in London at the request of the Excess Insurers, other deponents testified in London at the request of the plaintiff on matters relating to the case. Their testimony is available for use at the trial in Pittsburgh.

17. At the depositions taken in London referred to in Paragraphs 15 and 16, the Excess Insurers had an opportunity to mark as Exhibits all documents from their own files relating to their defenses. The documents marked as Exhibits to those depositions are available to be offered at the trial of the case in Pittsburgh.

18. Documents produced by the parties during the course of discovery, which number approximately 15,000, are now assembled in Pittsburgh. Only approximately 1,500 of these documents were produced in London. More of the potential witnesses in the case live in the United States than in London. CBG does not presently intend to call anyone from London as a witness.

19. The Excess Insurers need not rely on deposition testimony but can supplement the depositions with live testimony here in Pittsburgh. They brought from London witnesses to testify at the hearing on their Motion. Those witnesses engage in business travel outside the United Kingdom.

20. The evidence which the Excess Insurers propose to introduce at trial relating to English law and the practices of the London insurance market is not complex. It can be understood by a Court and Jury in Pittsburgh since said Court also uses the English language.

21. CBG does not trade or reside within the jurisdiction of English courts. CBG does not derive profits out of England.

22. Defendant INA does not join in the Motion to Dismiss on the ground of forum non conveniens. Defendant INA does business in Pittsburgh, but not in London. INA's business in London is done through a separate corporation. INA is a Pennsylvania corporation having its principal place of business in Philadelphia.

23. The Excess Insurers are not all English corporations. One of them does business in Brussels, not in the London insurance market. Two of them are United States corporations and two are Japanese corporations. Others are incorporated in Ireland, Scotland, Israel, Japan, Switzerland and Belgium as well as England.

24. One issue in the case is whether the law of England or the law of Pennsylvania should be applied to the formation and interpretation of the excess insurance contract. If the Court should determine that English law applies, the Court in Pittsburgh can determine the substance of English law by referring to authoritative treatises on the subject of English insurance law and by receiving evidence from experts.

25. In prior dealings with CBG the Excess Insurers agreed to be subject to suit in the United States and designated the Pennsylvania insurance commissioner as an agent for service of process.

26. The Excess Insurers agreed that the excess insurance contract would have the same basic terms as the underlying INA policy, which was issued and delivered in Pennsylvania. The only difference between their contract and the INA policy is that their coverage is for the excess layer and would involve different premium and brokerage terms.

27. Whereas in Pittsburgh there are voluminous documents and numerous witnesses who can provide evi-

dence on the merits regarding relevant events in Guinea, there are few such documents and witnesses in London.

28. If the case were dismissed in Pittsburgh and recommenced in England, the English proceedings would not involve a jury trial. The plaintiff has requested a jury trial.

29. The parties would suffer unfair hardship if the case were now tried in London rather than Pittsburgh.

III. Conclusions of Law In Re Forum Non Conveniens

30. Forum non conveniens is a common law doctrine under which a Court having jurisdiction and venue may, in certain limited circumstances, exercise discretion to dismiss the suit so that it may be tried in another forum.

See *Gulf Oil Corp. v. Gilbert* 330 U.S. 501, 507 (1947)

31. When jurisdiction and venue requirements are met, the plaintiff's choice of forum should rarely be disturbed.

See *Id.*, at 508

32. The plaintiff's choice of forum should be followed unless there is persuasive evidence that the retention of jurisdiction will result in manifest injustice to the defendant.

See *Hoffman v. Goberman*, 420 F.2d 424, 428 (3d Cir. 1970)

33. When the dismissal would result in forcing an American plaintiff to bring its claim in a foreign court, absent a clear showing of manifest injustice, the court should retain jurisdiction even though the more convenient forum may be the foreign one.

See *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966); *Hoffman v. Goberman*, supra.

34. The fact that the court may have to apply English law is no ground for dismissal. The interpretation of the law of a foreign country is a task from which federal courts do not shirk.

See *Hoffman v. Goberman*, supra, at 427; *D'Angelo v. Petroleos Mexicanos*, 308 F. Supp. 72, 85. (D. Del. 1975)

35. The court should find manifest injustice only when the plaintiff's sole motive for choosing the forum was to harass, oppress or vex the defendant and where another forum exists which would be more convenient for all parties, including the plaintiff.

See *Gulf Oil Corp. v. Gilbert*, supra; *Hoffman v. Goberman*, supra; *Argyll Shipping Co. v. Hanover Insurance Co.*, 297 F. Supp. 125, 129 (S.D.N.Y. 1968).

36. When dismissal would force an American plaintiff to bring its case in a foreign court where procedures comparable to those in an American trial are not available, it should not dismiss the action.

See *Mobil Tankers Co. v. Mene Grande Oil Co.*, supra; *Phoenix Canada Oil Co., Ltd. v. Texaco, Inc.* 78 F.R.D. 445, 455 (D. Del. 1978).

37. It would be unjust to dismiss the case and thereby to force the plaintiff to litigate its claim in England after the litigation before this court has proceeded for four years.

38. It would be unjust to dismiss the case and thereby to force the plaintiff to litigate its claim in England, where it could not get service over Defendant INA,

where the proceedings would not involve a jury trial which the plaintiff has sought, where the plaintiff has no office and does no business, where there are no, or relatively few, witnesses or documents relating to the central issues in the case, and where the Court would not have the familiarity with the controversy which this Court has attained while the action has been pending here.

39. It would be unjust to dismiss the case against the Excess Insurers and thereby to force the plaintiff to litigate substantially the same claim against INA in this court and against the Excess Insurers in the English court.

40. The plaintiff did not choose this forum simply to harass, oppress or vex the Excess Insurers, since much of the plaintiff's evidence, witnesses and documents are located in Pittsburgh, the insurance was requested and paid for in Pittsburgh, the insurance contracts were delivered in Pittsburgh and all defendants are subject to suit in Pittsburgh.

41. The Excess Insurers are in no way prevented from presenting to this court a full and effective defense. Testimony and documents which they say they need for their defense are already before this court in the form of depositions and exhibits. Witnesses can as easily come from England to Pittsburgh as they could go to England from Pittsburgh, from Guinea and from other places where they may be found. Indeed, English witnesses have already appeared and testified at length before this court in this action.

42. Considering the interests of all parties, the location of evidence, the nature of the issues, the age of these proceedings, the proper administration of cases, and the interests of justice, Pittsburgh is the most convenient and appropriate forum for the trial of this case.

IV. Order In Re Forum Non Conveniens

AND NOW, this 5th day of AUGUST, 1980, upon consideration of the Findings of Fact and Conclusions of Law hereinabove made in the above-captioned case, and it appearing that the ends of justice require that the case be tried before this Court, and it further appearing that none of the defendants will suffer manifest injustice if the above-captioned case is tried before this Court, and in fact, the plaintiff will be improperly delayed and unfairly hindered in the prosecution of its case if the matter is not tried before this Court.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motions to Dismiss this case on the grounds of forum non conveniens filed by the Excess Insurer Defendants on May 20, 1977, and again on October 22, 1979, be and are denied. The parties are directed to complete all pre-trial matters immediately to the end that this case will be tried in the United States Court for the Western District of Pennsylvania as soon as it is conveniently possible.

PAUL A. SIMMONS
United States District Judge

LAWS OF PENNSYLVANIA, SESSION OF 1972
Act No. 271
1972 P.L. 1063 (at p. 1211)

CHAPTER 83
BASES OF JURISDICTION

§ 8302. Nonqualified foreign corporations.

(a) General rule.—Any foreign corporation which shall have done any business in this Commonwealth without procuring a certificate of authority to do so from the Department of State as required by statute, shall be conclusively presumed to have designated the Department of State as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising within this Commonwealth. Service of process shall be made in the manner provided by section 8307 of this title (relating to procedure for service of process).

* * * * *

§ 8309. Acts affecting jurisdiction.

(a) General rule.—Any of the following shall constitute "doing business" for the purposes of this chapter:

(1) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(2) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(3) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(4) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by the Commonwealth or any of its agencies.

(5) The ownership, use or possession of any real property situate within this Commonwealth.

(b) Exercise of full constitutional power over foreign corporations.—In addition to the provisions of subsection (a) of this section the jurisdiction and venue of courts of the Commonwealth shall extend to all foreign corporations and the powers exercised by them to the fullest extent allowed under the Constitution of the United States.

* * * * *

LISTING OF PARENTS, PARTIALLY OWNED SUBSIDIARIES AND AFFILIATES OF CROSS-PETITIONERS

Eagle Star Insurance Company, Ltd.

Incorporated in England with its head office in London.

Stock is owned entirely by Eagle Star Holdings Ltd., a British corporation.

Hanover Insurance Company

Incorporated in New Hampshire with its head office in Manchester.

Slightly more than 50% of its stock is owned by State Mutual Life Insurance Company, a Massachusetts corporation with its head office in Worcester.

Continental Assurance Company of London, Ltd.

Incorporated in England, with its head office in Rickmansworth, Hertfordshire, England.

Stock is owned entirely by INA Corp., a Pennsylvania corporation with its head office in Philadelphia.

The Century Insurance Co. Ltd.

Incorporated in Scotland with its head office in London.

Stock is owned entirely by Phoenix Assurance Company, Ltd., a British corporation with its head office in London.

Home Insurance Company, Ltd.

Incorporated in New Hampshire with its head office in Manchester.

Stock is owned entirely by City Investing Company, a Delaware corporation with its head office in New York City.

Slater-Walker Insurance Co. Ltd.

Incorporated in England with its head office in London. It is no longer in business.

Stock is owned entirely by Providence Capitol Life Assurance Limited, a British corporation, all the stock of which is owned by Gulf & Western Industries, Inc., a Delaware corporation with its head office in New York City.

Yasuda Fire & Marine Insurance Co. (UK) Ltd.

Incorporated in England with its head office in London.

Stock is owned entirely by Yasuda Fire & Marine Insurance Company, Ltd., a Japanese corporation with its head office in Tokyo.

Turegum Insurance Company Ltd.

Incorporated in Switzerland with its head office in Zurich.

Stock is owned entirely by Zurich Versicherungsgesellschaft, a Swiss corporation with its head office in Zurich.

Excess Insurance Co. Ltd.

Incorporated in England with its head office in London.

Stock is owned entirely by ITT Hartford Europe Ltd., a British corporation with its head office in London, all the stock of which is owned by Abbey International Corp., a Georgia corporation with its head office in Hartford, Connecticut; the stock of Abbey is owned entirely by Hartford Fire Insurance Company, a Connecticut corporation with its head office in New York City, 99.9% of the stock of which is owned by International Telephone & Telegraph Corporation, a Delaware corporation with its head office in New York City.

Trident Insurance Co. Ltd.

Incorporated in England with its head office in London.

Stock is owned entirely by General Reinsurance Corporation of Connecticut, a Connecticut corporation with its head office in Greenwich, all the stock of which is owned by General Reinsurance Corp., a Delaware corporation with its head offiec in Greenwich, Connecticut.

Stronghold Insurance Co. Ltd.

Incorporated in England with its head office in Norwich.

Stock is owned entirely by Norwich Winterthur Reinsurance Group, a British corporation with its head office in Norwich, all the stock of which is owned by Norwich Winterthur Holdings, Limited, a British corporation with its head office in Norwich. The stock of the latter company is owned 45% by Norwich Union Fire Assurance Society Limited, a British limited insurance corporation; 45% by Winterthur Insurance Company of Switzerland, a Swiss corporation with its head office in Winterthur; and 10% by Chiyoda Fire & Marine Insurance Company, Limited, Tokyo, a Japanese corporation with its head office in Tokyo.

British Reserve Insurance Co. Ltd.

Incorporated in England with its head office in London.

Stock is owned entirely by Riunione Adriatica di Sicurta, S.p.A., an Italian corporation with its head office in Milan.

English & American Insurance Co. Ltd.

Incorporated in England with its head office in London.

Stock is owned entirely by C. T. Bowring & Co. Ltd., a British corporation with its head office in London, all the stock of which is owned by Marsh & McLennan Companies, Inc., a Delaware corporation with its head office in New York City.

Joint Appendix

1

Office - Supreme Court, U.S.
FILED
DEC 15 1981
ALEXANDER L. STEVAS.
LERK

No. 81-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX
VOLUME I

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, PA 15230
412-288-3144

Counsel of record
for Cross-petitioners

CLOYD R. MELLOTT
Eckert, Seamans, Cherin
& Mellott
42nd Floor
600 Grant Street
Pittsburgh, PA 15219
412-566-6000

Counsel of record
for Cross-respondent

PETITION FOR CERTIORARI FILED
SEPTEMBER 1, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

HERRICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15238

APPENDIX

TABLE OF CONTENTS

VOLUME I

Date Filed	*Dkt. Nr.*	*Description*	*Page*
		Relevant docket entries	1a
1975			
Dec. 11	1	Complaint	8a
1976			
Feb. 17	33	Amended answer of excess insurer defendants	13a
Nov. 19	41	Plaintiff's first request for production of documents	22a
1977			
Jan. 24	45	Defendants' answers and objections to plaintiff's first request for production of documents	26a
May 12	46	Plaintiff's motion to compel	29a
May 20	47	Notice, affidavit and motion for summary judgment dismissing complaint	31a
		Affidavit in support of defendants' motion	39a
		Affidavit in support of defendants' motion	40a
1978			
Apr. 7	62	Affidavit of David Glynne-Jones dated Dec. 9, 1977	42a
Apr. 7	63	Affidavit of Francis Joseph John Prisco dated Dec. 9, 1977	48a
Apr. 7	64	Affidavit of Oliver Prior dated Dec. 9, 1977	49a
Apr. 7	67	Affidavit of Milton Beadling dated Feb. 13, 1978	49a

Date Filed	Dkt. Nr.	Description	Page
Apr. 7	65	Affidavit of Robert W. Doty dated Apr. 4, 1978	54a
Apr. 7	66	(First) Affidavit of Dale Hershey dated Apr. 4, 1978	56a
Apr. 7	68	Affidavit of William B. Witney dated Feb. 13, 1978	62a
		Statement that above seven affidavits (Dkt. Nrs. 62-68) were filed by counsel for plaintiff under their blue cover	65a
		Transcript of proceedings, June 14, 1978	65a
July 14	76	Plaintiff's request to excess insurer defendants for documents	67a
July 17	77	Objections of excess insurer defendants to plaintiff's request for documents	68a
July 27	80	Second Affidavit of Mark F. Bruckmann	69a
		Form of affidavit in support of defendants' motion	73a
		Extracts from affidavits made by excess insurer defendants	
		The Insurance Corporation of Ireland Ltd.	77a
		Continental Assurance Company of London Ltd.	77a
		Slater, Walker Insurance Co., Ltd.	78a
		Yasuda Fire & Marine Insurance Co. (UK) Ltd.	78a
		Nichido Fire & Marine Insurance Co. Ltd.	79a

Date Filed	*Dkt. Nr.*	*Description*	*Page*
		Sahar Insurance Co. Ltd.	79a
		Excess Insurance Co. Ltd.	79a
		Trident Insurance Co. Ltd.	79a
		Stronghold Insurance Co. Ltd.	80a
		British Reserve Insurance Co. Ltd.	80a
		English & American Insurance Co. Ltd.	80a
		Condolidated European Reinsurance Co. Ltd.	81a
		Affidavit of James Roland Blake Fox-Andrews, Q.C.	81a
		Transcript of proceedings, July 27, 1978	87a
Nov. 8	—	Petition of excess insurer defendants for extension of time to answer interrogatories and order notice	97a, 98a
Nov. 24	84	Third affidavit of Mark F. Bruckmann	98a
Nov. 27	85	Plaintiff's motion to compel	100a
Nov. 28	86	Excess insurer defendants' answer to motion to compel	103a
		Transcript of proceedings December 21, 1978	105a
1979			
		Transcript of proceedings February 8, 1979	120a
Feb. 23	109	Plaintiff's motion for order due to failure to make discovery	121a
Mar. 8	110	Excess insurer defendants' answer to plaintiff's motion for order due to failure to make discovery	130a

Date Filed	*Dkt. Nr.*	*Description*	*Page*
Mar. 19		Second affidavit of Dale Hershey, Esquire	133a
Apr. 12	118	Plaintiff's motion for injunction	141a
		Transcript of proceedings April 18, 19, 1979	144a
		Plaintiff's case-in-chief	144a
		Defendants' case-in-chief	187a
		Court's findings	195a
		and Order	204a
Apr. 19	122	Order (preliminary injunction)	195a
May 21	138	Plaintiff's motion for continuance of permanent injunction hearing	205a
June 1	142	Excess insurer defendants' answer to plaintiff's motion for continuance of permanent injunction hearing	208a
June 1	140	Excess insurer defendants' notice of depositions	209a
June 15	150	Plaintiff's motion for protective order	210a
June 25	152	Excess insurer defendants' response to plaintiff's request for documents	213a

VOLUME II

Date Filed	*Dkt. Nr.*	*Description*	*Page*
		Transcript of proceedings June 25, 1979	214a
June 25	w/138	Order	226a
June 25	w/150	Order	227a
Nov. 2	200	Corrections to statements of counsel, Mark F. Bruckmann, Esq.	228a
Nov. 2	201	Corrections to statements of counsel, Mary Ann D'Amato, Esq.	235a

Date Filed	*Dkt. Nr.*	*Description*	*Page*
		Transcript of proceedings November 5, 6, 7, 1979	239a
		Plaintiff's case-in-chief Nov. 5, 1979	239a
		Defendants' case-in-chief Nov. 5, 1979	256a

		Direct	
John Grace		256a	
	Nov. 6, 1979		
		Direct	*Cross*
		272a	281a
James Roland Blake Fox-Andrews			
		Direct	*Cross*
		289a	319a
	Nov. 7, 1979		
		Redirect	*Recross*
		327a	329a

1980			
Aug. 5	237	Preliminary statement, findings of fact and conclusion of law	342a
		Permanent injunction order	358a
Aug. 29	243	Notice of Appeal	360a
		COURT OF APPEALS	
1981			
June 10		Opinion of the Court, Aldisert, circuit judge	363a
		Gibbons, circuit judge dissenting in part	381a
June 10		Judgment	391a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,
Plaintiff,
v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., MERCANTILE & GENERAL REINSURANCE CO. LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,
Defendants.

No. 75-1567

RELEVANT DOCKET ENTRIES

Date	*Nr.*	*Proceedings*
1975		
Dec. 11	1	Complaint filed
Dec. 11		Summons issued
Dec. 24	3	Summons returned served for each of Defts except Insurance Co of North America by the Pa Insurance Commissioner office in Harrisburg . . .
Dec. 31	12	Answer filed by defts named in ct 2 of complaint (all insurance companies except Ins Co of North America)
1976		
Feb. 5	31	Answer to Ins Co of North America filed
Feb. 17	33	Amended answer filed by defts named in ct II of complaint filed
Oct. 21	39	Motion to amend caption and delete the deft. Mercantile & General Reinsurance Co. Ltd and proposed order filed
Oct. 26	w/39	Order ent amending caption and removing Mercantile & General Reinsurance Co. Ltd (Cohill, J)
Nov. 19	41	Pltfs First request for production of documents filed
1977		
Jan. 24	45	All defts except Insurance Co of North America answers and objections to plf's 1st request for production of documents filed
May 12	46	Pltf's motion to compel defts to answer interrogatories and to produce documents and proposed order filed
May 20	47	Notice, affidavits and motion for summary judgment filed by defts

Date	*Nr.*	*Proceedings*
1978		
Apr. 7	62	Affidavit of David Glynne Jones, London, England filed
Apr. 7	63	Affidavit of Francis Joseph John Prisco, England filed
Apr. 7	64	Affidavit of Oliver Prior, England, filed
Apr. 7	65	Affidavit of Robert W. Doty filed
Apr. 7	66	Affidavit of Dale Hershey filed
Apr. 7	67	Affidavit of Milton Beadling filed
Apr. 7	68	Affidavit of William B. Witney filed
Jul 14	76	Request for production of documents by plf to defts except Ins Co of N America
Jul 17	77	Objections of excess insurer defts to plfs request for production of documents filed
Jul 20	78	Plf's response to excess insurers' 1st request for production filed
Jul 27	79	Hearing held on motion for summary judgment before Simmons, J. and concluded. Memo filed (Rep. Cutright)
Jul 27	80	Second affidavit of Mark F. Bruckmann filed
Nov 8		Petition for extension of time to answer interrogs filed and order entered at CA 75-1228 directing def. given 30 additional days to answer interrogs (Simmons, J.)
Nov 24	84	Affidavit of Mark F. Bruckmann filed
Nov 27	85	Pltf's motion to compel excess insurer defts to produce documents as previously ordered by this court filed with proposed order
Nov 28	86	Answer to plaintiff's motion to compel excess insurer defendants to produce documents filed

Date	*Nr.*	*Proceedings*
Dec 21		Plaintiff's motion to objections of interrogs. and discover held before Simmons, J. and concluded CAV. Memo filed at CA 75-1228. Status conference 4/2/79 at 10:00 AM (Rep. Harrington)
1979		
Feb 20	105	Documents in compliance with court order of 12/19/78 filed by all defts except INA, Vol 1 and 2 (2 red folders)
Feb 23	109	Mot for order due to failure to make discovery filed by plfs with proposed order
Mar 8	110	Answer to plf mot for order due to failure to make discovery filed
Mar 19	115	Affidavit of counsel (second affidavit of Dale Hershey filed)
Apr 12	118	Motion for injunction filed with proposed order by plf
Apr 12	119	Order ent setting hearing on mot for inj for 4/16 at 9:30 (Simmons, J.)
Apr 13	120	Mot to postpone hearing on prel inj filed by Excess Insurer with proposed order
Apr 16	121	Hearing on plf inj held before Simmons, J—Memo filed (rep. D. Harrington) addtl hearing set for 4/19 at 10 AM
Apr 19	122	Order that Excess Insurer, discontinue further prosecution of suit in High Court of Justice, Queen's Bench Div, and they desist from filing any other actions relating to matters now before this court during pendency of present action (see order for more details) and hearing on perm inj set for 6/25 at 9:30 (Simmons, J)
Apr 20	—	$1000 bond filed by plf (Fed Ins Co)

Date	*Nr.*	*Proceedings*
Apr 23	128	NOTICE OF APPEAL by Excess Insurer defts (all defts except Ins Co of N America) from order of 4/19/79
May 14	136	Praecipe for appearance as addtl counsel for excess insurer defts except Ins Co of N America filed by Atty Trent
May 21	138	Plf mot for continuance of injunction hearing filed with proposed order
Jun 1	140	Notice taking deposition of Excess insurer defts and of Bland Payne Ltd on 7/9 filed by defts excess insurer
Jun 1	141	Application for commission to obtain evidence abroad filed by excess insurer deft
Jun 1	142	Answer to plf mot for continuance of injunction hearing filed by excess insurer def
Jun 4	w/141	Letters of request to Hon Justices of Her Majesty's High Court London, England re taking depositions to be used at hearing set for 8/8/79 (Simmons, J and G. Conley, Acting for the Clerk) (orig given counsel for service)
Jun 11	147	Answer of Excess Insurer defts to plf mot for injunction filed
Jun 15	150	Notice, motion for protective order by plf with proposed order
Jun 15	151	Notice by plf taking depositions of 7/16 of John Grace, Ivan Peter Hammersley, Brian R Bond, Peter Down, R A Heard, Wm Griffith, Roy E Wood, Peter Head, Joseph Kaplan, John Walter E McCabe, James A Kinahan, John M Hunn, Lord Grantley, Leonard F Albroton, Christopher Thomas, Michael Wilson, Keith F Arnold

Date	*Nr.*	*Proceedings*
Jun 25	152	Excess Insurer Deft's response to pltfs request for documents filed
Jun 25	153	Hearing on pltfs motion for protective order; pltfs motion for continuance of permanent injunction begun and concluded before Simmons, J. Hearing memo filed. (Rep. D. Harrington)
Jun 25	w/138	Order entered on motion directing that hearing on permanent injunction scheduled for 8-8, 9 & 10, 1979 shall be continued until a date, to be specified by further order of Court, following the determination by the U. S. Court of Appeals for the 3rd. Circuit of the appeal of this Court's preliminary injunction order dated 4-19-79. (Simmons, J.)
Jun 25	w/150	Order entered on motion directing that the issues of in personam jurisdiction & subject matter jurisdiction, having been determined by this Court in favor of the pltf & against the Excess Insurer defts after extensive briefing, oral argument and the presentation of evidence, shall not be the subject of further discovery, testimony or evidence in this case & further ordered that the depositions noticed by the Excess Insurer defts to commence in London on 7-9-79, shall not commence until one week following the service of interrogatory answers & the production of documents by the Excess Insurer defts as ordered by this Court on 6-14 and 15, 1978. (Simmons, J)
Jun 27	154	Mot to reinstate perm inj hearing date filed in Ins Corp Ireland et al, excess insurer defts with proposed order

Date	*Nr.*	*Proceedings*
July 16	157	Application for commission to obtain evidence abroad filed [by excess insurer defendants]
July 16	158	Notice of depositions of Bland Payne International Ltd. 8/20/79 at 10:00 AM by proper officers and servants & those identified in notice
Aug	—	Certif copy of order from ct appeals dtd 7/30 dismissing appeal with agreement of parties
Nov 8	206	Hearing before Simmons, J begun 11/5, contd 11/6, 11/7 and concluded CAV Memo filed (rep J Goodworth)
Oct 22	187	Mot of Excess Insurer Defts to dismiss ct 2 on ground of forum non conveniens with proposed order
Nov 2	198	Plf answer to excess insurers mot to dismiss on ground of forum non conveniens filed
1980		
Aug 5	237	Preliminary stmt, findings of fact, conclusions of law, and order in re permanent injunction: Excess Insurer defts discontinue any further prosecution of suit in High Court of Justice, Queen's Bench Div, 1979-1-No.1727; that they desist from filing any other actions to issues in this action during pendency of present action; Services of the order shall be effective upon delivery of copy of this order to Pgh Counsel of Excess Insurer, and supple service of this order may be made by delivery of copies to London solicitors by any competent adult; Prel inj ent 4-19-79, be in full force until deft is effectively served with this perm inj order (Simmons, J)

Date	*Nr.*	*Proceedings*
Aug 5	238	Prel stmt, findings fact and conclusions of law and order in re forum non conveniens: motions to dismiss filed by Excess Insurer defts 5/20/77, and on 10/22/79, are denied;
		* * * *
Aug 29	243	NOTICE OF APPEAL by all defts except Ins Corp of N. America form order 8/5/80 (Atty E K Trent)
Sep 23	248	Praecipe for withdrawal of appearance of Mark Bruckmann, Mary Ann D'Amato and Mendes & Mount as attys for defts other than Ins Co of N America. (Weis and Weis and Reed, Smith will remain as counsel for said defts), proposed order
Sept. 24	250	Copy of proceedings of Findings of Fact and Order entered from the bench by Judge Simmons on 4/19/80 furnished by counsel and filed
Sep 24	w/248	Order granting leave to M Bruckmann, M A D'Amato and Mendes & Mount to withdraw as counsel for defts other than Ins Co of N America (Simmons, J)
Sep 25	—	Record forwarded court of appeals with docket entries (4 boxes) Also forwarded for use in appeal, certain pleadings (in 2 boxes) from 75-1228 #38, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 64, 65, 71, 72, 75

[W.D. Pa. Title not Printed]

COMPLAINT

The Plaintiff, Compagnie des Bauxites de Guinea (hereinafter "CBG"), by its attorneys, Robert W. Doty and Eckert, Seamans, Cherin & Mellott, states the following cause of action against the Defendants, Insurance Company of North America, The Insurance Corporation of Ireland Ltd., Mercantile & General Reinsurance Co. Ltd., Eagle Star Insurance Co. Ltd., Hanover Insurance Company, Continental Assurance Company of London Ltd., The Century Insurance Co. Ltd., Yuval, the Insurance Company of Israel Ltd., Home Insurance Co. Ltd., Slater, Walker Insurance Co. Ltd., Yasuda Fire & Marine Insurance Co. (UK) Ltd., Nichido Fire & Marine Insurance Co. Ltd., Turegum Insurance Company, Sahar Insurance Co. Ltd., Excess Insurance Co. Ltd., Trident Insurance Co. Ltd., Vesta (UK) Ltd., Chiyoda Fire & Marine Insurance Co. Ltd. Tokyo, Stronghold Insurance Co. Ltd., British Reserve Insurance Co. Ltd., English & American Insurance Co. Ltd., Consolidated European Reinsurance Co. Ltd., and L'Union Atlantique S.A. d'Assurances, Brussels.

COUNT I

1. CBG is a corporation incorporated in the State of Delaware, and has its principal place of business outside of the territorial limits of the United States of America.

2. At all material times, CBG has been engaged in the business of mining bauxite ore at Sangaredi, Republic of Guinea, transporting it by rail to Kamsar, Republic of Guinea, and processing and shipping bauxite ore from its facility at Kamsar.

3. Insurance Company of North America (hereinafter "INA") is a corporation incorporated in the Common-

wealth of Pennsylvania, and has its principal place of business in the Commonwealth of Pennsylvania. INA conducts business and maintains a place of business at 875 Greentree Road, Pittsburgh, Pennsylvania 15220.

4. The amount in controversy in this action is in excess of $10,000, and jurisdiction of this Court is conferred by 12 U.S.C.A. § 1332.

5. CBG is the owner of pan feeders and a crusherhouse (sometimes referred to together as the "crusherhouse") which are used in processing bauxite ore at CBG's facility at Kamsar, Republic of Guinea.

6. On or about February 12, 1974, INA issued its insurance policy No. 71HF1195 to CBG insuring the crusherhouse and other property of CBG against all risks, including loss resulting from the interruption of business caused by damage to or destruction of real or personal property at, among other locations, CBG's bauxite processing and shiploading facility at Kamsar, Republic of Guinea. A true and correct copy of said policy No. 71HF1195 is attached hereto, marked Exhibit "1", and made a part hereof.

7. During 1974, and after February 12, 1974, the pan feeders and crusherhouse sustained major failures resulting in the loss of their use at full capacity until repairs and rebuilding of the same were completed. As a result of the loss of use of the pan feeders and crusherhouse, the amount of bauxite ore processed and shipped by CBG at its Kamsar facility was reduced.

8. The interruption of CBG's business, as described in paragraph 7, has resulted in losses to CBG in an amount in excess of $10,000.

9. INA was duly notified of the damage to the pan feeders and crusherhouse and of CBG's claim for its losses sustained as a result thereof.

10. The losses sustained by CBG resulting from the damage to the pan feeders and crusherhouse are covered by said policy No 71HF1195 issued by INA, and all conditions precedent to such coverage have been performed or have occurred.

11. INA has failed and refused, despite demand, to provide coverage for the losses suffered by CBG, and has refused any payment in connection with the failures of the pan feeders and crusherhouse under policy No. 71HF1195.

WHEREFORE, the Plaintiff, Compagnie des Bauxites de Guinea, demands judgment against the Defendant, Insurance Company of North America, for monetary damages in excess of $10,000, together with interest and costs of suit.

COUNT II

12. Paragraphs 1 and 2 of Count I are incorporated herein by reference.

13. The Defendant corporations (excluding INA which is not included in this Count II) are incorporated in states or countries other than the State of Delaware, and have their principal places of business in states or countries other than the State of Delaware. The Defendant, Hanover Insurance Company, is a foreign insurance company licensed to transact business in the Commonwealth of Pennsylvania. The Defendants, Excess Insurance Co. Ltd. and English & American Insurance Co. Ltd., are authorized to transact business in the Commonwealth of Pennsylvania as surplus lines carriers. The

remaining Defendants named in this Count II are not licensed or authorized to transact business in the Commonwealth of Pennsylvania.

14. The amount in controversy in this action is in excess of $10,000, and jurisdiction of this Court is conferred by 12 U.S.C.A. § 1332.

15. Paragraph 5 of Count I is incorporated herein by reference.

16. On or about April 10, 1974, Bland Payne Ltd. (formerly Bland, Welch & Co. Ltd.) issued its insurance Cover Note No. 4093011 to CBG on behalf of the Defendants named in Count II hereof insuring, effective February 12, 1974, the crusherhouse and other property of CBG against all risks physical loss or damage resulting from the interruption of business at CBG's bauxite processing and shiploading facility at Kamsar, Republic of Guinea. A true and correct copy of the Cover Note providing such insurance is attached hereto, marked Exhibit "2", and made a part hereof. CBG made application for the insurance provided by the said Cover Note at Pittsburgh, Allegheny County, Pennsylvania and the said Cover Note was issued and delivered by or on behalf of the Defendants named in this Count II to CBG at Pittsburgh, Allegheny County, Pennsylvania. Further, the premiums for the said Cover Note were paid by CBG at Pittsburgh, Allegheny County, Pennsylvania.

17. The insurance provided by Cover Note 4093011 is in the amount of $10,000,000 for each and every loss, which coverage applies to any loss which is in excess of $10,000,000. The initial $10,000,000 of coverage is provided by INA policy No. 71HF1195, Exhibit "1" hereto.

18. Paragraph 7 of Count I is incorporated herein by reference.

19. The interruption of CBG's business, as described in paragraph 18 has resulted in losses to CBG in an amount in excess of $10,010,000.

20. The Defendants named in this Count II were duly notified of the damage to the pan feeders and crusherhouse and of CBG's claim for its losses sustained as a result thereof.

21. The losses sustained by CBG resulting from the damage to the pan feeders and crusherhouse are covered by the insurance provided under Cover Note 4093011, and all conditions precedent to such coverage have been performed or have occurred.

22. The Defendants named in Count II hereof have failed to provide coverage for the losses suffered by CBG and have refused any payment in connection with the pan feeders and crusherhouse under the insurance provided by Cover Note 4093011.

WHEREFORE, the Plaintiff, Compagnie des Bauxites de Guinea, demands judgment against the Defendants, The Insurance Corporation of Ireland Ltd., Mercantile & General Reinsurance Co. Ltd., Eagle Star Insurance Co. Ltd., Hanover Insurance Company, Continental Assurance Company of London Ltd., The Century Insurance Co. Ltd., Yuval, the Insurance Company of Israel Ltd., Home Insurance Co. Ltd., Slater, Walker Insurance Co. Ltd., Yasuda Fire & Marine Insurance Co. (UK) Ltd., Nichido Fire & Marine Insurance Co. Ltd., Turegum Insurance Company, Sahar Insurance Co. Ltd., Excess Insurance Co. Ltd., Trident Insurance Co. Ltd., Vesta (UK) Ltd., Chiyoda Fire & Marine Insurance Co. Ltd. Tokyo, Stronghold Insurance Co. Ltd., British Reserve Insurance Co. Ltd., English & American Insurance Co. Ltd., Consolidated European Reinsurance Co. Ltd., and L'Union Atlantique S.A. d'Assurances, Brussels, for monetary damages in excess of $10,000, together with interest and costs of suit.

ROBERT W. DOTY
Eckert, Seamans,
Cherin & Mellott
Attorneys for Plaintiff

PLEASE TAKE NOTICE that the Plaintiff demands trial by jury in this action.

ROBERT W. DOTY
Eckert, Seamans,
Cherin & Mellott
Attorneys for the Plaintiff

The exhibits to the complaint appear at pages 395a and 423a, infra.

* * * *

[W.D. Pa. Title not printed]

AMENDED ANSWER

AND NOW COME the defendants named in Count II of Plaintiff's Complaint and file the following Amended Answer to Count II of Plaintiff's Complaint.

COUNT ONE

This count refers to the plaintiff's claim against the co-defendant, Insurance Company of North America only and therefore these defendants aver that no answer is required by them.

In the event that an Answer to Count I is required by these defendants then these defendants aver that after reasonable investigation they are without knowledge or information sufficient to form a belief to the paragraphs of Count I and strict proof therefore is demanded at the trial of this case.

COUNT TWO

12. As to the allegations of fact contained in the paragraphs numbers 1 and 2 of the plaintiff's Complaint, these defendants aver that after reasonable investigation, they are without knowledge or information sufficient to form a belief thereto and strict proof thereof is demanded at the trial of the case.

13. The first three sentences are admitted. The last sentence is denied as stated. Some of the remaining defendants are believed to be licensed and authorized to transact business in Pennsylvania. These defendants reserve the right to amend and answer to this paragraph of Plaintiff's Complaint.

14. It is denied the amount in controversy in this action is in excess of $10,000. It is denied that this Court has jurisdiction of the subject matter of this lawsuit and it is further denied that this Court has jurisdiction over these defendants.

15. As to the allegations of paragraph 5 of Count I of the plaintiff's Complaint, these defendants aver that after reasonable investigation, they are without knowledge or information sufficient to form a belief thereto and strict proof thereof is demanded at the trial of this case.

16. Denied as stated. It is admitted that Bland Welch & Company, Ltd. on April 10, 1974 issued cover note number 4093011 to C.B.G. The remaining allegations of the first sentence of this paragraph are denied as stated. Exhibit "2" is admitted. The remaining allegations of this paragraph of plaintiff's Complaint are denied as stated. It is denied that Bland Welch & Company, Ltd.

were the agents, servants or employees of these defendants. It is averred that the defendants agreed to the cover note referred to as Exhibit "2" subject however to all of its terms and conditions. It is further averred that each of these defendants agreed and acted solely on their own behalf and not on the behalf of any of the other defendants, and each of the defendants individually aver that its liability is limited to the percentage amount shown in the writing attached to the cover note referred to as Exhibit "2". It is averred that the application for insurance from these defendants was made at London, England that the cover note was issued and delivered at London, England and that the premiums for said policy were paid at London, England.

17. Denied as stated. The insurance provided by cover note 4093011 in the amount of $10,000,000 applies only to losses which are covered by it and also before any liability attaches to these defendants, the terms and conditions of the policy must be complied with. It is admitted that any coverage owned by these defendants would be excess coverage. The initial coverage would be that provided by INA Policy No. 71HF1195 and would be primary coverage. In any event, said cover note provided that the coverage would be "excess of U.S. $10,000,000 each and every loss."

18. As to the allegations of paragraph 7 of Count I of the plaintiff's Complaint, these defendants aver that after reasonable investigation, they are without knowledge or information sufficient to form a belief thereto and strict proof thereof is demanded at the trial of this case.

19. As to the allegations of paragraph 19 of the Plaintiff's Complaint, this defendant avers that after reasonable investigation, it is without knowledge or infor-

mation sufficient to form a belief thereto and strict proof thereof is demanded at the trial of this case.

20. Paragraph 20 of the Plaintiff's complaint is denied. It is denied that these defendants were duly notified of the damage to the panfeeder and crusher house and of CBG's claim for alleged losses sustained as a result thereof. On the contrary, it is averred that the plaintiff failed to give these defendants prompt written notice of its claim as is required by the policy involved.

21. It is denied that the losses allegedly sustained by CBG resulting from alleged damage to the panfeeder and crusher house are covered by the insurance provided under cover note 4093011. It is further denied that all conditions precedent to such coverage have been performed or have occurred. On the contrary, it is averred that the plaintiff has failed to give the required notice of loss; failed to file the proper written proof of loss within sixty (60) days as is required by the policy. The losses claimed by the plaintiff exceed the six month period as is more fully set forth in the aforesaid cover note. The policy does not apply to the alleged losses as the plaintiff's claim comes within the exclusions that are set forth in paragraphs 2, 3, 4, and 12 of the exclusion attached to the policy involved. The defendants are not liable for any consequential or resultant loss sustained by the plaintiff. The plaintiff neglected to use all reasonable means to mitigate damages after the loss occurred.

22. It is denied that these defendants owed any coverage for the alleged losses claimed by the plaintiff and therefore plaintiff is not entitled to receive any payment from these defendants.

SECOND DEFENSE

23. The applicable statutes of limitations provided by law and by the policy itself has expired since twelve (12) months has elapsed from the inception of the loss and the filing of this suit. In addition, all of the requirements of the policy were not complied with prior to the filing of this suit.

THIRD DEFENSE

24. The plaintiff has failed to set forth a claim upon which relief can be granted.

FOURTH DEFENSE

25. The venue is improper.

FIFTH DEFENSE

26. In further answer to the pertinent averments of Plaintiff's Complaint, it is admitted that Exhibit "1" is a true and correct copy of the policy of insurance referred to which was issued by INA and it is further averred that Exhibit "2", the cover note referred to in Plaintiff's Complaint is a true and correct copy. These defendants aver, however, that the policy and cover note referred to speak for themselves and the averments of Plaintiff's Complaint are not proper, true and/or correct interpretations thereof. Further, said policy and cover note provide only for the coverage for loss from business interruption caused by damage to real or personal property occurring during the term of the policy and after the inception date thereof under all of the applicable provisions and terms of the said policy and cover note, the said provisions and terms of which are herewith incorporated herein. It is averred that, under all of the applicable terms and provisions of the said policy and cover note, the losses alleged

and claimed by the plaintiff are not covered under the said policy and cover note.

SIXTH DEFENSE

27. In further answer to the pertinent averments of Plaintiff's Complaint, it is averred that the primary damages to the said pan feeders and crusher house took place, occurred and were sustained on a date prior to February 12, 1974, and prior to April 10, 1974, the date of issuance of the said policy and cover note. For this reason, it is averred that the damage in question occurred prior to a date on which the policy and cover note in question were issued and the alleged loss is not covered under the said policy and cover note. Strict proof of all said material allegations is demanded at the time of trial.

28. By way of further defense, these defendants aver that the said prior damage to the property in question was not revealed by the plaintiff to these defendants prior to or at the time of the issuance of the said Policy No. 71HF1195 and cover note, all of which is contrary to the terms, conditions and provisions of the said policy and cover note and all of which serves to eliminate coverage for the alleged loss.

SEVENTH DEFENSE

29. By way of further defense, these defendants aver that, in addition to the other policy and cover note restrictions and conditions applicable hereto, the said Policy No. 71HF1195 and cover note contain the following applicable exclusions:

II(a) Mechanical Breakdown, unless other accident covered hereunder ensues, and then this policy shall cover the ensuing loss only;

II(c) Inherent vice, latent defect, wear and tear, gradual deterioration, delay, loss of market.

These defendants aver that the alleged damage to the pan feeders and crusher house was or may have been caused by mechanical breakdown, inherent vice, laten defect, wear and tear and/or gradual deterioration, so that these defendants are not liable to the plaintiff for the said alleged losses or damages.

TWELFTH DEFENSE

30. By way of further defense these defendants aver that the said policy of insurance No. 71HF1195 and cover note provide inter alia, under Requirements, in case a loss occurs:

> "The Insured shall give immediate written notice to this company of any loss . . . and within sixty days following the date of damage to or destruction of the real or personal property described . . . the Insured shall render to this company a proof of loss, signed and sworn to by the Insured . . ."

These defendants aver that the plaintiff failed to meet this requirement of the policy particularly in view of the fact that the plaintiff failed to give immediate written notice to the company of the business interruption loss, as well as failing to timely file a proof of loss. This lack of immediate written notice of the loss and lack of timely filing of proof of loss bars all recovery in this matter by the plaintiff.

THIRTEENTH DEFENSE

31. By way of further defense, these defendants aver that the said policy of insurance No. 71HF1195 and cover note set forth the requirements for the contents of the proof of loss. It is averred by this defendant that the

proof of loss which was filed, untimely, was not properly completed in accord with the policy and cover note requirements.

FOURTEENTH DEFENSE

32. By way of further defense, these defendants aver that the plaintiff has not suffered any monetary loss or damage as provided and covered under the said policy and cover note and further aver that the plaintiff has failed to proffer or supply the necessary proof regarding proper alleged damages.

FIFTEENTH DEFENSE

33. By way of further defense, these defendants aver that the said policy of insurance No. 71HF1195 and cover note provide that suits against these defendants, under the policy and cover note, can only be filed and maintained if all of the requirements of the policy and cover note have been complied with and if the suit is commenced within twelve months next after the inception of the loss. This defendant avers that the plaintiff failed to comply with and satisfy these provisions of the policy and cover note including the fact that it did not comply with all of the requirements of the policy and cover note and the fact that suit was not commenced within twelve months next after the inception of the loss. There was no waiver of this provision of the policy or cover note nor was any extension of time for filing of the said suit granted by these defendants to the plaintiff for filing more than twelve months beyond the actual date of inception of the loss.

SIXTEENTH DEFENSE

34. By way of further defense, these defendants aver that, under the said policy No. 71HF1195 and cover note, these defendants are not liable for any loss occurring while the hazard is increased by any means within the control or knowledge of the Insured.

These defendants aver that the alleged loss occurred and was caused by an increase in the hazard by means and methods of operation of the property in question and related property, all of which were then within the control and knowledge of the Insured. The defendant avers that this fact, if proven, serves to bar all recovery in this matter.

SEVENTEENTH DEFENSE

35. The event or events that are alleged by the plaintiff to have caused the loss in question were not immediate, sudden or fortuitous and, therefore, the event or events in question were not an accident that would cause coverage to exist pursuant to the alleged insurance policy and cover note.

EIGHTEENTH DEFENSE

36. By way of further defense, these defendants aver that the period of indemnity for losses sustained by the business interruption amounts to six months only, and that many of the losses allegedly sustained by the plaintiff exceeded that period.

NINETEENTH DEFENSE

37. By way of further defense, it is averred that the policy and cover note in question do not apply to the alleged losses of the plaintiff since it comes within the exclusions that are set forth in paragraphs 2, 3, 4 and 12

of the exclusion attached to the policy. These defendants are not liable for any consequential or resultant losses of the plaintiff. Plaintiff has neglected to use all responsible means to mitigate damages after the losses occurred.

TWENTIETH DEFENSE

38. By way of further defense, it is denied that this Court has jurisdiction over the subject matter of this lawsuit and it is further denied that this Court has personal jurisdiction over these defendants.

WHEREFORE, these defendants deny that they are indebted to the plaintiff in the sum demanded or in any sum whatsoever and demand judgment be entered in their favor and against the plaintiff.

WEIS & WEIS

By Thomas F. Weis

* * * *

[W.D. Pa. Title not printed]

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, Compagnie des Bauxites de Guinee (CBG) requests that each Defendant produce the documents hereinafter described which are either within the possession, custody or control of Defendant or Defendant's agents, employees, or representatives in accordance with Rule 34 of the Federal Rules of Civil Procedure. Plaintiff requests that the said documents be produced for inspection and copying on September 8, 1976, at 10:00 a.m. at the offices of Eckert, Seamans, Cherin & Mellott, 42nd Floor, 600 Grant St., Pittsburgh, PA 15219.

As used in this Request, the term "document" means every writing, record or graphic preparation of any type, nature or description and all mechanical sound recordings or transcripts thereof, however produced or reproduced, irrespective of authorship or how obtained, which are in the possession, custody, or control of Defendant, their agents, or representatives, including, but not limited to, agreements or correspondence, telegrams, memoranda, handwritten notes, summaries, lists, schedules, attachments, charts, reports, surveys, studies, minutes of notes of meetings or telephone conversations, lists of persons attending meetings, notebooks, diaries, calendars, legal documents, financial records, forecasts, appointment books, designs, drawings, films or videotapes, microfilm or microfiche, advertisements, circulars, trade letters, press releases, original or preliminary notes, marginal comments appearing on any document and any and all containers, folders, envelopes, boxes, or other receptacles or repositories housing or containing such "documents". The term "document" shall also mean any copies of any of the foregoing by whatever means reproduced and all drafts whether or not later finalized.

1. All documents which relate in any way whatsoever to the investigations made by Defendant or any person or corporation hired or retained by Defendant to perform an investigation with regard to the issuance of the business interruption policies to CBG.

2. All documents which relate in any way whatsoever to the negotiation of premium rates, terms of policy, and the drafting of the language of the business interruption policies to CBG.

3. All documents which relate in any way whatsoever to all claims made by CBG under business interruption

policies or cover notes issued by Defendants with regard to the crusherhouse tower, pan feeders and related equipment (hereinafter collectively called "the Crusherhouse").

4. All documents which relate in any way whatsoever to the negotiation of premium rates, terms of the policy, and the drafting of policy language relating to Defendant's participation in the contractor's all risk policy, including property damage coverage, on the Crusherhouse.

5. All documents which relate in any way whatsoever to notices given and claims made relating to the Crusherhouse under the coverage described in the foregoing paragraph.

6. All documents which relate in any way whatsoever to investigations made by Defendant or any person or corporation hired or retained by Defendant to perform an investigation with regard to the issuance or proposed issuance of the following coverages relating to the facilities in Guinea constructed by and for CBG and Office d'Amenagement de la Region de Boke (OFAB):

(a) The contractor's all risk policy;
(b) Interim insurance covering property damage and general liability;
(c) Excess property damage insurance;
(d) Liability insurance.

7. Copies of all business interruption insurance policies issued by Defendant during the period from January 1, 1972 to December 31, 1975. In the alternative, Defendant is requested to produce all standard forms, used by Defendant between January 1, 1972 and December 31, 1975, as sources for the drafting of business interruption coverage written by Defendant.

8. All drafts and final versions of insurance policies of any type or kind which were issued to CBG by Defendant.

9. All documents which relate in any way whatsoever to any investigations or reports in the possession, custody, or control of Defendant relating to the Crusherhouse, including, but not limited to, investigations or reports concerning the accident which gives rise to this action.

10. All documents which relate in any way whatsoever to any notice, knowledge, information, or awareness of any accident, incidents or occurrences relating to the Crusherhouse, received by Defendant from any source.

11. All documents relating to the role of Marsh & McLennan, or any other insurance broker or agent, involved in providing business interruption coverage to CBG.

ECKERT, SEAMANS,
CHERIN & MELLOTT

By Dale Hershey
Attorneys for Plaintiff
Compagnie des Bauxites
de Guinee

Date: August 9, 1976

[W.D. Pa. Title not printed]

DEFENDANTS' ANSWERS AND OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

AND NOW COME all of the above named defendants, except the defendant Insurance Company of North America, by and through their attorneys, Weis & Weis, and file these Answers and Objections to the plaintiff's first request for production of documents, these Answers and Objections are filed on behalf of all defendants except The Insurance Company of North America:

1. The answering defendants hereby agree to produce such documents as requested in paragraph No. 1 of plaintiff's Request for Production of Documents to the extent that such documents exist. At this time, it is the belief of the answering defendants that no such documents as requested in this paragraph of plaintiff's Production of Documents exist and therefore none are provided.

2. See Answer contained in paragraph No. 1.

3. The answering defendants do object to the production of the documents requested in paragraph No. 3 of plaintiff's Request for Production of Documents. The materials requested by plaintiff deal with matters not involved in this lawsuit and are therefore irrelevant. Further, the answering defendants do object to the production of any documents relating to claims made by the plaintiff concerning this lawsuit because these documents were accumulated in anticipation of litigation and are therefore not discoverable by the plaintiff.

4. The answering defendants do object to the request for Production of Documents contained in paragraph No. 4 of plaintiff's request in that the request is for docu-

ments and supporting materials with relation to the contractors all risk policy and therefore they are irrelevant since this lawsuit deals only with the business interruption coverage provided the plaintiff.

5. The answering defendants do object to the request made in paragraph 5 of plaintiff's Request for Production of Documents in that the request relates to coverage in the contractors all risk policy and it is the answering defendants understanding that this lawsuit deals only with the business interruption coverage provided to the plaintiff and therefore the request made under this paragraph of plaintiff's Request for Production of Documents are for materials which are irrelevant to this lawsuit.

6. The answering defendants do object to paragraph No. 6 of plaintiff's Request for Production of Documents in its entirety. The request contained in this paragraph of plaintiff's Request for Production of Documents do not in any way relate or deal with the business interruption coverage which is the subject of this lawsuit and therefore the answering defendants do believe that the material requested is irrelevant to this lawsuit.

7. The answering defendants do object to the production of any policies written by the answering defendants for the period of time stated in plaintiff's request. Further, the answering defendants do object to the production of any standard forms that may have been used by the answering defendants from the period stated in the plaintiff's request except as otherwise provided in paragraph 1 and 2 of this document. The production of the materials as requested in plaintiff's Request for Production of Documents would be extremely expensive and burdensome to the answering defendants and further forms and copies of policies written in other situations are not relevant to this lawsuit and are therefore not discoverable. Further, the

policy involved in this lawsuit has already been provided to the plaintiffs for their review.

8. The answering defendants do object to the request for rough drafts or final versions of any policies issued from any of the answering defendants to the plaintiff. The answering defendants have already provided the policy involved in this lawsuit to the plaintiffs for their review and would object to the production of any other policies or drafts of policies as being irrelevant to this lawsuit and an overburdensome request upon the answering defendants.

9. The answering defendants do object to the production of the materials as requested in paragraph No. 9 of plaintiff's Request for Production of Documents. These documents were prepared and accumulated in anticipation of litigation and as such are not discoverable.

10. The answering defendants state that receipt of a copy of a letter from Marsh & McLennan to Bland Payne and receipt of the suit papers filed at the above number and term was the first notice of any claim involving the policy which is the subject of this lawsuit.

11. The answering defendants do object to the request as stated in paragraph 11 of plaintiffs' Request for Production of Documents in that the answering defendants did not employ or engage nor did they have any control over the actions of Marsh & McLennan at any time and more specifically they did not have any control over the action of Marsh & McLennan at all times relevant to this lawsuit.

WEIS & WEIS

By Thomas F. Weis

[W.D. Pa. Title not printed]

PLAINTIFF'S MOTION TO COMPEL DEFENDANTS TO ANSWER INTERROGATORIES AND TO PRODUCE DOCUMENTS

Plaintiff moves this Court for an order, in the form attached hereto, compelling Defendants to answer fully Plaintiff's Interrogatories to Defendants (First Set), to produce documents in response to Plaintiff's First Request for Production of Documents, and to pay the Plaintiff's costs in bringing this Motion. In support of its Motion Plaintiff states as follows:

1. On August 9, 1976 Plaintiff served upon Defendants and filed Plaintiff's Interrogatories to Defendants (First Set), attached hereto as Exhibit A. On the same date Plaintiff served upon Defendants Plaintiff's First Request for Production of Documents, attached hereto as Exhibit B.

2. Though Defendant INA has repeatedly promised to file interrogatory answers, *it has failed to answer any interrogatories to date.* On October 30, 1976, Defendant INA submitted unfounded objections to Interrogatories 5, 7, 8, 9, 10, and 11. Defendant INA has not objected to, but has not answered, Interrogatories 1, 2, 3, 4, 6, 13, 14, 15, 16, 17, 18, 19, and 20.

3. Defendant INA has produced some documents in response to paragraphs 1, 2, 7, 8, 9, 10, and 11 of the Request for Production. Defendant INA improperly objects to producing documents in response to paragraphs 3, 4, 5, 6, and 8.

4. The Defendants other than INA (hereinafter "The Secondary Insurer Defendants") have filed timely answers to some of the interrogatories and have objected to answering other interrogatories. The answers filed by

the Secondary Insurer Defendants to Interrogatories 1, 2, 3, 4, 5, 7, 10, 11, 12, and 22 are incomplete, inadequate, and unresponsive. The objections filed by the Secondary Insurer Defendants to Interrogatories 6, 7, 8, 12, and 26 are without merit. The Secondary Insurer Defendants have not obtained a protective order entitling them not to answer the interrogatories to which they object.

5. The Secondary Insurer Defendants have *failed to provide any documents* in response to the Request for Documents and have not objected to any of the requests.

6. Pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, Plaintiff also moves this Court for an order, in the form attached hereto, compelling the Defendants, or their attorneys, or both, to pay the Plaintiff's reasonable expenses, including attorneys fees, caused by their failure to respond properly to Plaintiff's discovery requests.

CLOYD R. MELLOTT
ROBERT W. DOTY
DALE HERSHEY
Eckert, Seamans,
Cherin & Mellott
Attorneys for Plaintiff

[W.D. Pa. Title not printed]

NOTICE

To: Robert W. Doty, Esquire
42nd Floor, U.S. Steel Bldg.
Pittsburgh, Pa. 15219

Randall J. McConnell, Jr., Esq.
3180 U.S. Steel Building
Pittsburgh, Pa. 15219

TAKE NOTICE that the within Motion was filed in the United States District Court for the Western District of Pennsylvania this 20th day of May, 1977.

WEIS & WEIS
By David L. Beck

* * * *

[W.D. Pa. Title not printed]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT

MARK F. BRUCKMANN, being duly sworn, deposes and says:

1. I am an attorney associated with MENDES & MOUNT, of counsel for moving defendants, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON, LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSUR-

ANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS. Said defendants (hereafter referred to as "EXCESS INSURERS") are those insurers who subscribed to the placing slips for Insurance Policy No. 40930110000. I am fully familiar with all facts and proceedings heretofore had herein.

2. I make this affidavit in support of:

a) the motion pursuant to FRCP 56 by all EXCESS INSURERS except EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, HOME INSURANCE COMPANY, LTD. and the TUREGUM INSURANCE COMPANY for summary judgment in their favor dismissing the complaint against them on the ground that this Court lacks in personam jurisdiction over them;

b) the motion pursuant to FRCP 56 by all EXCESS INSURERS for summary judgment dismissing the action against them on the ground of forum non conveniens.

3. The instant action was commenced by the filing of the summons and complaint on or about December 11, 1975. In its complaint, a copy of which is annexed hereto, made a part hereof, and marked Exhibit A, plaintiff, COMPAGNIE DES BAUXITES DE GUINEA (hereafter, CBG) seeks reimbursement under two separate insurance policies issued by co-defendant INSURANCE COM-

PANY OF NORTH AMERICA (hereafter, INA), and the defendant EXCESS INSURERS.

4. Upon information and belief, and as appears from the aforesaid complaint, CBG is incorporated in the State of Delaware and has its principal place of business outside the territorial limits of the United States, specifically, in the Republic of Guinea, Africa. Further, the complaint does not allege that CBG is authorized to do business in the State of Pennsylvania, and, according to the records of the Secretary of the Commonwealth, CBG is not registered to do business in Pennsylvania. A certification by the Secretary to this effect is annexed hereto, made a part hereof, and marked Exhibit B.

5. Upon information and belief, and as appears from the aforesaid complaint, CBG represents a joint venture between Halco (Mining) Inc. and the Republic of Guinea, respectively owning 51% and 49%, engaged in the business of mining bauxite ore at Sangaredi, Guinea and transporting it to Kamsar, Guinea where it is processed and shipped. The CBG facilities at Kamsar include equipment known as a crusherhouse, used in processing bauxite ore.

6. In the aforesaid complaint, plaintiff alleges that on or about February 12, 1974, defendant INA issued insurance policy No. 71HF1195 to CBG. Said policy insured CBG's Guinean operations against loss resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property, by the perils insured against, covering losses in an amount up to $10,000,000.

7. In the aforesaid complaint, plaintiff further alleges that on or about April 10, 1974, Bland Payne Ltd., (formerly, Bland, Welch & Co. Ltd.) issued its insurance Cover Note No. 4093011 to CBG. Said Cover Note reflected the terms contained in the placing slips for Policy

No. 40930110000 subscribed by the EXCESS INSURERS which allegedly insured CBG's Guinean operations against loss resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property, by the perils insured against, covering losses in excess of $10,000,000. for an amount up to $10,000,000.

8. Plaintiff further alleges in the aforesaid complaint that during 1974 the crusherhouse sustained major failures which resulted in the loss of their use at full capacity and a consequent interruption of CBG's business. It is alleged that the aforesaid loss was covered by the respective insurance provided by defendant INA and defendant EXCESS INSURERS and that despite demand the defendants have refused to make any payment in connection with the loss.

9. In its answer to the complaint, a copy of which is annexed hereto, made a part hereof, and marked Exhibit C, defendant INA denied that the losses claimed by the plaintiff occurred within the effective dates of its policy, denied that the loss was within the coverage provided and denied that the plaintiff complied with the terms and conditions of the policy, particularly the notice provision.

10. In their amended answer to the complaint, a copy of which is annexed hereto, made a part hereof and marked Exhibit D, defendant EXCESS INSURERS assert, among other things, that the alleged losses are not covered by the insurance provided by them, that the plaintiff failed to fulfill conditions precedent, particularly with respect to timely notice and proof of loss, that the alleged losses occurred outside the effective dates of their coverage, that the action was not commenced within the applicable statute of limitations and that the Court lacks subject matter jurisdiction and in personam jurisdiction over the defendant EXCESS INSURERS.

11. All defendant EXCESS INSURERS except EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, HOME INSURANCE COMPANY LTD., and TUREGUM INSURANCE COMPANY LTD., move for summary judgment dismissing the complaint against them on the ground that this Court lacks in personam jurisdiction over them. As is further evidenced by the affidavits of various Underwriters employed by these moving defendants, copies of which are annexed hereto, made a part hereof and marked Exhibits E (1 through 17), all moving defendants are alien corporations, organized and existing under the laws of Great Britain, Belgium or Israel, none of which are now nor have been licensed to do business in the State of Pennsylvania since at least 1970.

12. As is further stated in the aforesaid affidavits, with the exception of EXCESS INSURANCE CO. LTD. and ENGLISH & AMERICAN INSURANCE CO. LTD., none of the moving defendants are now, nor at any time since 1970 have been, authorized by the State of Pennsylvania to conduct any form of insurance business in that State. EXCESS INSURANCE CO. LTD. and ENGLISH & AMERICAN INSURANCE CO. LTD. are not now, nor at any time since 1970 have been, authorized by the State of Pennsylvania to conduct any form of business or to insure any risks in that State except as eligible surplus line insurers.

13. As is further stated in the aforesaid affidavits, with the exception of EXCESS INSURANCE CO. LTD. and ENGLISH & AMERICAN INSURANCE CO. LTD., none of the moving defendants have ever authorized an agent for the service of process within the State of Pennsylvania. EXCESS INSURANCE CO. LTD. and ENGLISH & AMERICAN INSURANCE CO. LTD. have never authorized such an agent except when said defendants

designated such an agent pursuant to the Pennsylvania Surplus Lines law and then only as regards Pennsylvania risks issued by it pursuant to such law.

14. As further appears in the aforesaid affidavits, the moving defendants do not now, nor at any time in the past have they, maintained an office or place of business or employed personnel in the State of Pennsylvania; owned any real or personal property or bank accounts in the State of Pennsylvania; or transacted any business in the State of Pennsylvania.

15. Upon information and belief, and as further appears in the affidavit of JOHN GRACE, an Underwriter for the defendant THE INSURANCE CORPORATION OF IRELAND LTD., annexed hereto, made a part hereof, and marked Exhibit F, the insurance coverage allegedly issued by the defendant EXCESS INSURERS was negotiated and procured in London, England. More specifically, the alleged contract of insurance was made in London, England, (except for that portion of the alleged coverage attributable to defendant L'UNION ATLANTIQUE S.A. D'ASSURANCES which was made in Brussels, Belgium), by the physical subscription of the placing slips for Policy No. 40930110000. Moreover, Cover Note No. 4093011 was issued in London, England and all payments of premiums were to be made to each of the defendant EXCESS INSURERS in London, England.

16. Moving defendants maintain that this Court lacks a valid predicate for the exercise of in personam jurisdiction over them. As demonstrated in the annexed affidavits of various Underwriters having personal knowledge of the operative facts, none of the moving defendants pursue a systematic course of business in this forum, nor do they have contacts with the State of Pennsylvania sufficient to properly subject them to the in

personam jurisdiction of federal courts sitting in this forum. In brief, the exercise of in personam jurisdiction over moving defendants is contrary to well-established precedent and constitutes a clear-cut violation of due process.

17. Not only do moving defendants lack contacts such as the presence of agents or employees in the forum, the maintenance of an office, bank or trust account or real or personal property in the forum or the regular solicitation of business in the forum which have, in some instances, been deemed adequate predicates for the exercise of in personam jurisdiction, the business transaction from which the instant suit arises had no significant connection with the State of Pennsylvania. As indicated in the affidavit of John Grace, annexed hereto as Exhibit F, the insurance agreement here in issue was solicited, negotiated and subscribed outside the United States, primarily in London, England. Cover Note No. 4093011 was issued in London, England. All payments of premiums were to be made in London, England and notice of the alleged loss and proof of loss were received by moving defendants in London, England. Thus the significant aspects of the insurance transaction were conducted outside the State of Pennsylvania.

18. Moreover, unlike other instances, the State of Pennsylvania has no interest in providing CBG a means of redress in the instant case. As indicated above, CBG is not incorporated in Pennsylvania, nor is it authorized to do business in Pennsylvania, nor has there been any allegation or demonstration that CBG is doing business in Pennsylvania. In addition, the insured risk is located in the Republic of Guinea, Africa. Therefore, not only are there no contracts between Pennsylvania and moving defendants, there are no contacts between the plaintiff and Pennsylvania which would justify this Court's exer-

cise of in personam jurisdiction over moving defendants. Parenthetically, assuming CBG is doing business in Pennsylvania, moving defendants contend that pursuant to Pennsylvania Business Corporation Law, 15 PA. Stat. 2014, the plaintiff lacks the capacity to bring the instant suit. The statute provides that no foreign business corporation transacting business in Pennsylvania without a certificate of authority is permitted to maintain an action in any court of Pennsylvania.

19. Finally, another consideration mandating against the exercise of in personam jurisdiction over moving defendants is the inordinate inconvenience moving defendants face in being forced to defend this action in Pennsylvania. All of moving defendants' personnel having personal knowledge of the operative facts here in issue reside and work outside the United States, primarily in London, England. The books and records necessary to the defense of the action are similarly located primarily in London, England. Thus it is exceedingly burdensome for moving defendants to defend this action in Pennsylvania.

20. In consideration of all the above-mentioned factors, it is clear that this Court lacks in personam jurisdiction over moving defendants and that dismissal of the complaint against them on this basis is not only proper, but required.

* * * *

25. In conclusion, there are no triable issues of fact as to the issues presented herein, and based on the foregoing, moving defendants are entitled to judgment dismissing the complaint against them as a matter of law.

WHEREFORE, it is respectfully urged that the motion for summary judgment dismissing the complaint against the moving defendants on the grounds of lack of in personam jurisdiction and forum non conveniens, be, in all respects, granted.

MARK F. BRUCKMANN

[Jurat not printed]

* * * *

[W.D. Pa. Title not printed]

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION

JOHN GRACE, being duly sworn, says:

1. I am an underwriter employed by defendant, The Insurance Corporation of Ireland Ltd. having personal knowledge of the facts herein stated and have been duly authorized by said defendant to so state. Said defendant is a corporation organized and existing pursuant to the laws of Great Britain.

Said defendant is not now, nor has it been licensed to do business in the State of Pennsylvania, U.S.A. since at least 1970, nor is it now or has it at any time since 1970 been authorized by the State of Pennsylvania to conduct any form of insurance business in that State.

3. Said defendant has never authorized an agent for the service of process within the State of Pennsylvania, U.S.A.

4. Said defendant does not now, nor has it ever, maintained an office or place of business, employed personnel or retained agents in the State of Pennsylvania, U.S.A.

5. Said defendant does not now, nor has it in the past owned any real or personal property in the State of Pennsylvania, U.S.A. or maintained a bank account in that State.

6. Said defendant does not now, nor has it in the past, transacted business in the State of Pennsylvania, U.S.A.

JOHN GRACE

[Jurat not printed]

Except for the country of incorporation (paragraph 1 of the above affidavit of John Grace), an underwriter for each of the other defendants contesting jurisdiction made and caused to be filed an affidavit identical to the above affidavit of John Grace, the underwriter for defendant The Insurance Corporation of Ireland, Ltd.

* * * *

[W.D. Pa. Title not printed]

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION

JOHN GRACE, being duly sworn, says:

1. I am an Underwriter for the Insurance Corporation of Ireland and I make this affidavit in support of the motion by defendants, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RE-

SERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, for an order dismissing the action against them on the ground of forum non conveniens.

2. The Insurance Corporation of Ireland is the leading Underwriter on the coverage issued by the above-named moving defendants to plaintiff as described in the placing slips for Policy No. 40930110000.

3. The aforementioned insurance coverage was obtained in the following manner: A representative of Bland Payne presented to various insurers, including all the above-named moving defendants, all of whom are licensed to transact insurance business in the London market, a placing slip for Policy No. 40930110000. Each of the above-named moving defendants agreed to provide the insurance coverage described in the placing slips for Policy No. 40930110000 by physically subscribing the aforesaid placing slips. The aforementioned physical subscription is effected by affixing the insurer's company stamp to the placing slip, followed by the initialling of the placing slip by a representative of each Company.

4. Each of the above-named moving defendants subscribed a placing slip for Policy No. 40930110000 in London, England, with the exception of L'UNION ATLANTIQUE S.A. D'ASSURANCES which subscribed a placing slip for Policy No. 40930110000 in Brussels, Belgium.

5. Subsequent to the subscription of the placing slips for Policy No. 40930110000 by each of the above-named moving defendants, Bland Payne issued Cover Note No. 4093011, a copy of which is annexed hereto, made a part hereof, and marked Exhibit A.

6. Cover Note No. 4093011 was issued in London, England, on April 10, 1974.

7. All payments of premiums pursuant to the terms of the placing slips for Policy No. 40930110000 were to be made to each of the above-named moving defendants in London, England.

8. Each of the above-named moving defendants received notice of the loss which is the subject matter of the instant lawsuit and plaintiff's claim under the coverage described in the placing slips for Policy No. 40930110000 in London, England, sometime subsequent to December 5, 1975.

9. A written proof of loss prepared by plaintiff in conjunction with its claim under the coverage described in the placing slips for Policy No. 40930110000 was received by the above-named moving defendants in London, England.

John Grace

[Jurat not printed]

* * * *

[W.D. Pa. Title not printed]

AFFIDAVIT OF DAVID GLYNNE-JONES

I, David Glynne-Jones, of 13, South Court, Kersfield Road, London, SW15 3HQ, Executive Company Director, make oath and say as follows:-

1. I am employed by Bland Payne Ltd. of Sackville House, Fenchurch Street, City of London, England. Bland Payne Ltd. is a firm of insurance brokers and is the successor to the company which in 1973 and 1974 was named Bland Welch & Co. Ltd. (Bland Welch).

2. Insofar as the facts and matters deposed to herein are not within my own knowledge they are derived from

enquiries made by me of personnel in the Bland Payne Group of companies and I believe them to be true.

3. Between August 1973 and April 1974 I was the person at Bland Welch in charge of the team placing the undermentioned business interruption insurance for Compagnie des Bauxites de Guinee (C.B.G.) at the request of the producing brokers Marsh & McLennan Inc. The efforts at placement resulted in an insurance contract, described in Bland Welch's Cover Note 4093011, prepared on or about 10th April 1974 (a true and correct copy of which is produced to me marked Exhibit A), in which the twentytwo underwriting companies identified in the attachment to the Cover Note agreed to insure C.B.G. against covered business interruption losses on an "all risks physical loss or damages" basis, each bearing the portion of the risk indicated opposite its name in the attachment to the Cover Note. The limits of the risk borne by the insurers were U.S. $10,000,000 each and every loss in excess of U.S. $10,000,000 each and every loss. The insurance contract referred to in the Cover Note became effective on 12th February 1974 for a term of one year.

4. Bland Welch's placement file contains a copy of an advertisement dated 15th January 1973 for the sale of 8% bonds issued by C.B.G. The advertisement was reproduced in The Economist of 10th February 1973. (A true and correct copy of the advertisement is now produced to me marked Exhibit B). This advertisement shows the bonds to be guaranteed 100% by Halco (Mining) Inc. and severally and unconditionally 47% by United States corporations (Aluminium Company of America and Martin Marietta Aluminium Inc.), 27% by a Canadian corporation, 10% by a French corporation, 10% by a West German corporation and 6% by an Italian corporation. The placement file also contains a description of the Boke Project prepared on the letter head of Henrijean & Cie

and identifying the owners of C.B.G. Bland Welch received the description from Henrijean & Cie. (A copy of the description is now produced to me and marked Exhibit C.) Though as leader of the team of Bland Welch personnel I did not personally have discussions with the underwriters with whom the C.B.G. coverage was placed, I can state that information concerning C.B.G. and its relationships with other corporations, to the extent that those relationships were reflected in the Bland Welch placement file, would have been available for underwriters' consideration in the course of negotiating the placement.

5. I am informed and I believe that of the twenty-two underwriting companies identified in the attachment to Exhibit A the countries of registration of those companies are distributed as follows.

England	13
USA	2
Japan	2
Israel	2
Switzerland	1
Belgium	1
Eire	1

Of the thirteen English companies eight of those represent parent or affiliate companies distributed as follows:

USA	3
Japan	1
Switzerland	1
France	1
Norway	1

The one Belgium company represents a U.S.A parent.

6. To the best of my knowledge underwriters who do business in the London market, such as the twentytwo companies with which the C.B.G. business interruption coverage was placed, do not maintain extensive files with respect to the placement itself. Such insurers are familiar with the manner in which coverage is placed in the London insurance market. On receipt of instructions to seek coverage in the London market the broker prepares a slip upon which he sets out in a conventional manner details of the risk and the coverage required. The slip is then taken to those underwriters who in the brokers experience are likely to be interested in participating in such an insurance. It is usual to approach first an underwriter who is of acknowledged experience in the particular field and the level of premium which he will agree is then usually accepted by subsequent subscribers. Each underwriter is presented personally with the slip by the broker and has the opportunity to ask questions of the broker regarding any matter material to the placing. I have described the placing procedure in its simplest form. In some cases it is necessary for the broker to see the underwriters on a number of occasions and refer back to the principal as necessary before all the terms are agreed and the slip fully subscribed. When the risk has been fully subscribed, for the benefit of the insured the broker prepares a cover note indicating the identity of the underwriters, the shares of their participation in the underwriting, and the basic terms on which they agree to provide coverage. In a placing of this kind, which refers to the wording of the underlying coverage, upon receipt of the underlying wording the broker prepares the excess policy for the approval and signature of the excess underwriters and then transmits it to the insured through the producing broker. The broker receives the premium from the producing broker who collects it from the in-

sured, and the premium is credited to accounts maintained by the broker for the underwriters, or if there are no such accounts, is paid to the underwriters directly.

7. In the present case the course of events was as follows.

(a) In August 1973 Bland Welch received a request from the New York office of Marsh & McLennan for a quotation for 16 million dollars business interruption coverage. Marsh & McLennan were the producing brokers. There followed a lengthy exchánge of telex messages culminating on 30th January 1974 with the Pittsburgh office of Marsh & McLennan's telex of that day. They were then seeking 10 million dollars of coverage in excess of 10 million dollars. It was indicated that the primary layer of 10 million dollars would probably be led by the Insurance Company of North America.

(b) Bland Welch first approached the Insurance Company of Ireland as the potential lead underwriter and a quotation was obtained for the excess layer of coverage at a rate of 0.8% per 1000 dollars of annual profits. This quotation was passed by Bland Welch to Marsh & MeLennan in Pittsburgh on 4th February 1974. On 8th February 1974 Bland Welch notiifed Marsh & McLennan in Pittsburgh that it had contacted three underwriters who, between them, would be prepared to underwrite 70% of the excess coverage. On the 11th February 1974 Marsh & McLennan's Pittsburgh office notified Bland Welch by telex that it had obtained C.B.G.'s authorization to place the excess coverage at the rate quoted by Bland Welch on 4th February 1974 and asked Bland Welch to proceed on this basis.

(c) The Insurance Company of Ireland Ltd. led the slip and Bland Welch then obtained the participation of the twentyone other companies concerned. Because one of those companies, L'Union Atlantique S.A., is located in Brussels, it was necessary to prepare a second placing slip to be sent to Brussels for initialling, the first slip being initialled by those companies represented in London being the remaining twenty. On 23rd February 1974 Bland Welch reported to Marsh & McLennan in Pittsburgh that it had completed placement of 100% of the risk.

(d) The total of the percentages written by underwriters came to more than 100%. After all the twentytwo companies had initialled the placing slips signifying their willingness to participate at the percentages which they accepted Bland Welch adjusted the percentages down to 100%.

(e) Following normal practice, Bland Welch prepared the cover note (exhibit A) to inform Marsh & McLennan of the terms of the coverage, the identity of the insurers and the percentage of each insurer's share of the risk. The cover note was sent to Marsh & McLennan in Pittsburgh by Bland Welch on 10th April 1974.

8. The terms of the insurance contract between C.B.G. and the underwriters identified in the attachment to the Cover Note appear on the placing slips, which were shown to and endorsed by representatives of each underwriter. (True and correct copies of the placing slips are now produced to me marked Exhibit D). However, in

1974 the underlying policy was not made available to Bland Welch and Bland Welch did not prepare the excess policy.

DAVID GLYNNE-JONES

[Jurat not printed]

* * * *

[W.D. Pa. Title not printed]

AFFIDAVIT OF FRANCIS JOSEPH JOHN PRISCO

I, Francis Joseph John Prisco, of 42, Beresford Avenue, Surbiton, Surrey, assistant company director, make oath and say as follows:-

1. I am employed by Bland Payne Ltd., Sackville House, Fenchurch Street, City of London, England. Bland Payne Ltd. is a firm of insurance brokers. Bland Payne Ltd. is the successor to the company which in 1973 and 1974 was named Bland Welch & Co. Ltd. (Bland Welch).

2. Between August 1973 and April 1974, I worked with David Glynne-Jones and Oliver Prior in the placement of business interruption insurance for Compagnie des Bauxites de Guinea. Mr. Prior and I contacted the underwriters personally.

3. I have read the affidavit of David Glynne-Jones dated 9th December 1977, and I agree with the statements of fact contained therein.

FRANCIS PRISCO

[Jurat not printed]

[W.D. Pa. Title not printed]

AFFIDAVIT OF OLIVER PRIOR

I, Oliver Prior, of 105 Elstree Road, Bushey Heath, Herts., executive company director, make oath and say as follows:

1. I am employed by Bland Payne Ltd., Sackville House, Fenchurch Street, City of London, England. Bland Payne Ltd. is a firm of insurance brokers. Bland Payne Ltd. is the successor to the company which in 1973 and 1974 was named Bland Welch & Co. Ltd. (Bland Welch).

2. Between August 1973 and April 1974, I worked with David Glynne-Jones and Frank Prisco in the placement of business interruption insurance for Compagnie des Bauxites de Guinea. Mr. Prisco and I contacted the underwriters personally.

3. I have read the affidavit of David Glynne-Jones dated 9th December 1977, and I agree with the statements of fact contained therein.

OLIVER PRIOR

[Jurat not printed]

[W.D. Pa. Title not printed]

AFFIDAVIT OF MILTON BEADLING

Before me, the undersigned authority, appeared Milton G. Beadling, who, after being duly sworn by me, deposed and said:

1. I am a Vice President of Marsh & McLennan, Inc. Marsh & McLennan, Inc. is a firm of insurance brokers having offices in various cities in the United States, including Pittsburgh, Pennsylvania.

2. In July or August 1973 I was contacted at my office in Pittsburgh by David Waer, who was acting on behalf of Compagnie des Bauxites de Guinee (CBG) in Pittsburgh. Mr. Waer informed me that CBG wanted to obtain quotations on $16,000,000 of business interruption coverage for its mine, railway, and harbor facilities in the Republic of Guinea. He asked that Marsh & McLennan act as broker to obtain the quotations.

3. In response to CBG's request, Marsh & McLennan contacted insurance markets in the United States and abroad. To obtain quotations from the London insurance market, Marsh & McLennan contacted Bland, Welch & Co., Ltd. (now Bland, Payne Ltd.) a London insurance brokerage firm.

4. Marsh & McLennan supplied information about CBG to Bland Welch & Co. and to the other insurance markets consulted. Included in the information was the fact that CBG is a Delaware corporation, the fact that Marsh & McLennan was dealing with CBG in Marsh & McLennan's Pittsburgh office, and the fact that the Aluminum Company of America is a major shareholder in Halco (Mining) Inc., which is a 51% owner of CBG. Marsh & McLennan supplied this information so that it would be passed along to insurers who might quote to provide the business interruption coverage.

5. Marsh & McLennan's efforts at obtaining quotations and placing the insurance resulted in insurance contracts, written in two layers, for a total of $20,000,000 of coverage for the period February 12, 1974 to February 12, 1975. CBG had increased the requested amount of coverage from $16,000,000 to $20,000,000 due to an increase in the price of bauxite on the world market. The Insurance Company of North America (INA) wrote the first $10,000,000 of coverage for each and every loss, as

provided in its Policy No. 71 HF 1195. The next layer of coverage of $10,000,000 was underwritten by twenty-two English and Belgian insurers with whom coverage had been placed by Bland, Welch. The twenty-two companies (hereinafter called "the excess insurers") are identified in the attachment to Bland, Welch's Cover Note 4093011 dated April 10, 1974.

6. Marsh & McLennan in Pittsburgh acted as agent for INA and the excess insurers for purposes of delivering the policy and cover note to the insured and for purposes of collecting the premium from the insured. With a letter dated June 11, 1974, a copy of which is attached hereto as Exhibit A, I transmitted to David Waer, representative of CBG, at Two Allegheny Center, Pittsburgh, Pennsylvania, the INA policy and the cover note evidencing the placement of coverage with the excess insurers. With the same letter I transmitted invoices, copies of which are attached in Exhibit A, for payment of the premiums due to the insurers. The premiums were duly paid to Marsh & McLennan, and were then transmitted to INA and to Bland Welch for distribution to the excess insurers.

7. The excess insurers, as indicated in the cover note, adopted the form of the underlying policy written by INA and did not submit a policy of their own. If the excess insurers had submitted a policy of their own, Marsh & McLennan in Pittsburgh would have acted as their agent in delivering the policy to CBG's representative in Pittsburgh.

8. Of the twenty-two excess insurers involved in the case brought by CBG, eighteen have been underwriters of risks in addition to the business interruption risk involved in this case, in instances where the Pittsburgh office of Marsh & McLennan has acted as broker. In each

of these instances, Marsh & McLennan acted in Pittsburgh as the agent for the London underwriters, for purposes of delivering the cover note and/or policy and collecting the premium from the insured. In order to substantiate the foregoing statements, a review has been made at my direction of insurance contracts in which the London underwriting companies have participated in coverage written for The Aluminum Company of America, Halco (Mining) Inc. and CBG. The insurance contracts reviewed, covering the period 1971 through December 11, 1975, the date on which CBG filed its action against the Insurance Company of North America and the twenty-two excess insurers, disclosed, for each of the London companies, the following number of insurance contracts in which that company participated during the period I have stated and as to which Marsh & McLennan acted as agent for the company in Pittsburgh. The list includes the contract on which suit is brought.

Company	*Insurance Contracts*
The Insurance Corp. of Ireland, Ltd.	14
Mercantile & General Reinsurance Co. Ltd.	1
Eagle Star Insurance Co., Ltd.	10
Hanover Insurance Company	6
Continental Assurance Co. of London,Ltd.	3
The Century Insurance Co. Ltd.	3
Yuval, The Insurance Company of Israel Ltd.	1
Home Insurance Co. Ltd.	3
Slater, Walker Insurance Co. Ltd.	3
Yasuda Fire & Marine Insurance Co. (UK) Ltd.	5
Nichido Fire & Marine Insurance Co. Ltd.	3
Turegum Insurance Company	6
Sahar Insurance Co. Ltd.	5
Excess Insurance Co. Ltd.	13
Trident Insurance Co. Ltd.	3
Vesta (UK) Ltd.	1

Chiyoda Fire & Marine Insurance Co. Ltd. Tokyo	1
Stronghold Insurance Co. Ltd.	5
British Reserve Insurance Co.	6
English & American Insurance Co. Ltd.	6
Consolidated European Reinsurance Co. Ltd.	3
L'Union Atlantique S.A. d'Assurances, Brussels	5

This list of contracts is not exhaustive, in that the companies may have entered other contracts for other insureds located in Pittsburgh and insurance may have been placed through other Pittsburgh brokers.

9. The review of insurance contracts described in the previous paragraph disclosed that it is a common practice for the London underwriting companies, when providing coverage to an insured located in the United States, to include a clause in the insurance policy in which the insurers agree to be subject to suit in the United States in connection with the risk being underwritten. For the reasons stated in paragraph 8 of the affidavit of David Glynne-Jones, filed herewith, no insurance policy was prepared by Bland Welch in connection with the particular underwriting by the excess insurers which is involved in the present suit. Actually, it is a common practice for London insurers to be delayed more than a year in preparing an insurance policy after the coverage goes into effect, and often no policy is prepared at all. In the case of the excess insurance contract on which this suit is brought, I know of no reason why, if a policy had been prepared, it would not have contained a clause in which the excess insurers would have agreed to be subject to suit in the United States in connection with the business interruption risk being underwritten.

10. As an insurance broker, I know the kinds of facts which underwriters seek to obtain before engaging in any underwriting. In light of the number of instances

where the excess insurers provided coverage to CBG and in light of the information provided for the use of the excess insurers as described in paragraph 4 above, I believe that the excess insurers knew or should have known, when they agreed to underwrite the business interruption risk involved in this case, that CBG is a Delaware corporation; that its affairs, particularly relating to insurance matters, are managed through Halco (Mining) Inc. in Pittsburgh; that two major United States corporations, The Aluminum Company of America and Martin Marietta Corporation, are part owners of Halco (Mining) Inc. and CBG; and that Marsh & McLennan would be acting as the agent of the insurers in Pittsburgh for purposes of delivering the cover note and/or policy and collecting the premium.

MILTON BEADLING

[Jurat not printed]

[W.D. Pa. Title not printed]

AFFIDAVIT OF ROBERT W. DOTY

Before me, the undersigned authority, appeared ROBERT W. DOTY, who, after being duly sworn by me, deposed and said:

1. I am a member of the firm of Eckert, Seamans, Cherin & Mellott, counsel for Compagnie des Bauxites de Guinee (CBG), plaintiff in the case brought in the United States District Court for the Western District of Pennsylvania, at No. 75-1567.

2. I make this affidavit in opposition to the motion for summary judgment filed in that action on behalf of the Excess Insurer Defendants on May 20, 1977.

3. On November 22, 1976, I had a conference with Mr. Gerald White at his office in London. Mr. White is a

director of Bland Payne, Ltd., which is the successor to Bland Welch & Co., Ltd., the London broker involved in the placement of the excess business interruption coverage on which the aforementioned suit is brought. Mr. White informed me that when Bland Welch placed the coverage with the excess underwriters, it gave information about CBG to the excess insurers and the other underwriters whom it approached. Mr. White stated that the excess insurers would have been informed prior to agreeing to underwrite the business interruption risk that the producing broker was the Pittsburgh office of Marsh & McLennan, Inc. and that the Aluminum Company of America is one of the principal owners of CBG. This information would have been given to the excess insurers as an indication of the quality of the risk which they were being asked to underwrite.

4. The documents relating to the merits of the case are located, with only a few exceptions, in Pittsburgh and in Guinea. At its offices in Pittsburgh, Halco (Mining) Inc. (hereinafter "Halco") maintains documents concerning the design and construction of CBG's facilities in Guinea, production records, and records relating to the business interruption involved in the case. Pursuant to the request of INA and the Excess Insurer Defendants, CBG has made available for inspection and copying at Halco's Pittsburgh office a substantial number of documents and engineering drawings. In connection with this case CBG has made available to the defendants in Pittsburgh approximately 10,000 documents, in addition to approximately 225 engineering drawings. The documents located in Halco's office in Pittsburgh are to some extent duplicates of documents maintained in CBG's offices in Guinea; however, many documents are maintained exclusively either at Pittsburgh or in Guinea. Neither Halco nor CBG maintains in London any documents

which would be relevant to this case. If CBG were required to sue the Excess Insurer Defendants in London, it would encounter the substantial inconvenience and harassment of having to transport this body of documents to London, as well as taking to London the operating and administrative personnel who now work in Pittsburgh and Guinea. The investigation of the structural failure of the crusherhouse and the design and performance of the rebuilding and strengthening of the crusherhouse for CBG was performed by persons located in the United States and primarily in Pittsburgh.

ROBERT W. DOTY

[Jurat not printed]

[W.D. Pa. Title not printed]

AFFIDAVIT OF DALE HERSHEY

Before me, the undersigned authority, appeared DALE HERSHEY, who, after being duly sworn by me deposed and said:

1. I am a member of the firm of Eckert, Seamans, Cherin & Mellott, counsel for Compagnie des Bauxites de Guinee (CBG), plaintiff in the case brought in the United States District Court for the Western District of Pennsylvania at No. 75-1567.

2. I make this affidavit in opposition to the motion for summary judgment filed in that action on behalf of the Excess Insurer Defendants on May 20, 1977.

3. On November 3, 1977, I had a telephone conference with a Mr. Gerald White in London. Mr. White is a director of Bland Payne, Ltd., which is the successor to Bland Welch & Co., Ltd., the London broker involved in the placement of the excess business interruption coverage on which the aforementioned suit is brought. Mr.

White stated to me that it is the practice in the London insurance market for the broker to act as the agent of the insured for purposes of placing coverage with underwriters and for the broker to act as the agent for the underwriters in delivering a policy to the insured and collecting a premium from the insured. In the underwriting involved in the present case Mr. White stated that Bland Welch would have acted in London as agent for the underwriters, and that it would in turn have relied on Marsh & McLennan in Pittsburgh to act also as agent for the underwriters, for purposes of collecting the insurance premium from the insured, CBG, in Pittsburgh.

4. Facts known to me demonstrate that the excess insurers do not have documents or records in London which would make it more convenient for them to have this suit brought in London. Those facts came to light when the plaintiff filed interrogatories and requested documents to obtain information from the Excess Insurer Defendants. After the interrogatories and document requests were submitted to the Excess Insurer Defendants on August 9, 1976, the Excess Insurer Defendants made a request of Bland Payne, the London insurance broker, for permission to see Bland Payne's placement file. The reason for this request was that the excess insurers had no documents regarding insurance coverage, and they needed the documents in Bland Payne's placement file in order to answer interrogatories and respond to the request for documents. The original of Bland Payne's placement was mailed to counsel for the excess insurers in New York. On or about September 14, 1977, I telephoned Mark Brickman, counsel for the excess insurers, and asked him to send the original file either to me or back to Bland Payne. He sent it back to Bland Payne. Having now reviewed the placement file, I

can state that it does not contain more than 100 documents. Therefore, it cannot be said that any significant body of documents exists in London which would mitigate in favor of the transfer of this litigation to London.

5. According to documents in the placement files of Marsh & McLennan and Bland Payne, the sequence of events regarding the placement of the excess insurance coverage was as follows:

> a. Telex from Bland Welsh in London to Marsh & McLennan in Pittsburgh, February 4, 1974: "Have secured indication for layer US DLRS 10,000,000 each and every loss excess of US DLRS 10,000,000 each and every loss on business interruption, 6 month period of indemnity (wording as underlying) of rate 0.80 0/00 (per mille) applicable to annual profit. . . . Await your news before seeking support for above."
>
> b. Telex from Bland Welch in London to Marsh & McLennan in Pittsburgh, February 8, 1974: "Re US Dollars 10,000,000 excess of US Dollars 10,000,000, have only seen three underwriters so far who have offered between them 70 pct."
>
> c. Telex from Marsh & McLennan in Pittsburgh to Bland Welch, February 11, 1974: "Have received insured's authorization to place 10 million $ excess including wharf cover at rate of .80 per thousand per your telex of 2/4. Please bind immediately 70% mentioned in your telex of 2/8 and also bind remainder as authorized by underwriters."
>
> d. Telex from Bland Welch in London to Marsh & McLennan in Pittsburgh, February 23, 1974: "Have now completed 100 pcnt on excess basis effective 12 February, terms as previously indicated."

e. Bland Welch contacted Marsh & McLennan in Pittsburgh seeking a copy of the primary INA policy so that it could prepare the excess policy. On March 1, 1974 Marsh & McLennan in Pittsburgh sent the following telex to Bland Welch: "INA has not yet completed form. Coverage will be basically as we reported for your authorization. If you wish to expedite immediately, we will accept cover note for excess warranted INA primary form."

f. Letter from Bland Welch to Marsh & McLennan in Pittsburgh, transmitting cover note and invoice, dated April 10, 1974: "[W]e now have pleasure in enclosing our Cover Note which unless we hear from you to the contrary we shall assume to be in accordance with your instructions.... Would you please provide us with a copy of the primary policy wording as soon as possible to enable us to prepare our wording and policy documents." Bland Welch's premium invoice (or debit note) was made out to "Marsh & McLennan Inc, Pittsburg" requesting payment to Bland, Welch & Co. Ltd. in the amount of $32,000, less Marsh & McLennan's 15% commission ($4,800.00), for a net payment of $27,200.00.

6. The excess insurers have participated in the underwriting of risks connected with CBG's operations in Guinea in addition to the business interruption risks involved in this action. Policies issued by the insurers contain clauses in which the excess insurers agree to be subject to suit in the United States. The named insureds in such policies are CBG, Halco, and/or OFAB (Office d'Amenagements de la Region de Boke, the branch of the Guinean government involved in the project). The policies contain the following language in which the excess

insurers have agreed to be subject to suit in the United States:

> "It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court."

The policies, issued to the above-named assured between 1971 and 1975, in which some of the excess insurers were among the underwriters and in which the foregoing clause appears, are as follows:

1. Marine Package Policy No. B-98335
   Date 12/2/72
   Assured: Alcoa Steamship Co. et al.

2. Wreck Removal Policy No. H 75 14670
   Date 5/27/75
   Assured: OFAB

3. Aviation Excess Liability Policy 74 ZW 1086
   Date 1/6/75
   Assured: OFAB, Halco, et al.

4. Aviation Excess Liability Policy 73 ZW 1086
   Date 11/30/73
   Assured: OFAB, Halco, et al.

5. Aircraft Excess Liability Policy No. 72 ZW 938
   Date 11/21/72
   Assured: OFAB, Halco, et al.

6. Aviation Hull Insurance Policy No. 73 ZW 1084
   Date 12/10/73
   Assured: OFAB, Halco, et al.
7. Aviation Hull Insurance Policy No. DM 71110
   Date 10/29/71
   Assured: OFAB, Halco, et al.
8. Aviation Excess Liability Policy No. DM 71111
   Date 10/29/71
   Assured: OFAB, Halco, et al.
9. Aviation Liability Insurance Policy No. DM71112
   Date 10/29/71
   Assured: OFAB, Halco, et al.
10. Aviation Hull Insurance Policy No. 74 ZW 1084
    Date 1/7/75
    Assured: CBG, OFAB, Halco, et al.

The originals of these policies are maintained in Halco's files in Pittsburgh, along with the INA policy and the excess insurers' cover note on which suit is here brought.

DALE HERSHEY

[Jurat not printed]

[W.D. Pa. Title not printed]

AFFIDAVIT OF WILLIAM B. WITNEY

Before me, the undersigned authority, appeared William B. Witney, who, after being duly sworn by me, deposed and said:

1. He is Senior Vice President-Administration of Halco (Mining) Inc. (hereinafter "Halco"), and as such he is administrator of insurance matters. He has been employed by Halco since 1972.

2. He makes this Affidavit in opposition to the Summary Judgment Motion filed by the Excess Insurer Defendants in the above-captioned case.

3. In his function as administrator of insurance matters, he succeeded David Waer. David Waer acted as administrator of insurance matters when the excess insurance coverage involved in the above-captioned case was procured by Compagnie des Bauxites de Guinee (hereinafter "CBG"). At the time of the procurement in 1974 David Waer was Secretary of Halco and Secretary of CBG. He maintained his office in Pittsburgh. Also at the time that the insurance was procured, the President and Treasurer of CBG maintained their offices in Pittsburgh.

4. CBG was incorporated in the State of Delaware on May 4, 1964. The corporation is a joint venture between Halco and the Republic of Guinea, which own respectively 51% and 49% of the shares of CBG. CBG owns and operates a bauxite mine and related facilities in the Republic of Guinea. Among the facilities is a crusherhouse which empties boulders from railroad cars and crushes the boulders into smaller pieces for storage and shipment.

5. Halco is a Delaware corporation authorized to do business in Pennsylvania, having offices at Two Allegheny Center, Pittsburgh, Pennsylvania. The stockholders of Halco are six major aluminum producers in the United States and abroad. The stockholders purchase the bauxite mined by CBG and use the bauxite to manufacture aluminum. The Aluminum Company of America (hereinafter "Alcoa"), a Pennsylvania corporation having its headquarters in Pittsburgh, is one of the largest stockholders. The two United States stockholders, Alcoa and Martin Marietta Aluminum, own 47% of the stock.

6. At its offices in Pittsburgh, Halco performs services for CBG under an Administrative Assistance Agreement, dated March 26, 1969, a copy of which is attached as Exhibit A. Under the Administrative Assistance Agreement, Halco performs the following services for CBG from its offices in Pittsburgh: general administration, financial management, purchasing, accounting, insurance, personnel matters and labor matters, and public and governmental relations.

7. Under the Administrative Assistance Agreement, Halco manages the insurance affairs of CBG out of Halco's Pittsburgh office. The insurance work performed by Halco for CBG in Pittsburgh includes the procurement of insurance, dealing with insurance brokers, payment of premiums, administration of insurance matters, the maintenance of the original insurance policies, and the preparation of claims. Premiums are paid out of CBG bank accounts maintained in Pittsburgh and administered in Pittsburgh by Halco.

8. CBG itself has no office, conducts no business, and conducts no activities in Pennsylvania. However, Halco, under the Administrative Assistance Agreement, performs extensive services at the request of CBG in Pitts-

burgh, including the aforementioned work connected with insurance.

9. In connection with the excess insurance coverage involved in the above-captioned action, Halco, acting on behalf of CBG under the Administrative Assistance Agreement, drew upon a bank account maintained in CBG's name in Pittsburgh to pay the insurance premium. A copy of the cancelled check reflecting such payment is attached hereto as Exhibit B. Halco deemed payment of the premium to Marsh & McLennan, the broker, to be a payment of the insurers. In connection with the payment of the premium, Marsh & McLennan was not acting at the direction of Halco or CBG. The payment of the premium was made in Pittsburgh.

10. Marsh & McLennan delivered the INA policy and the excess insurers' cover note to Halco in Pittsburgh, where Halco maintains such documents for CBG. The INA policy and the cover note were delivered by Marsh & McLennan to Halco in Pittsburgh with the invoices for the business interruption coverage. In delivering the policy and cover note, Marsh & McLennan was not acting at the direction or under the control of Halco or CBG.

11. While the business interruption coverage was in effect, it became necessary for CBG to shut down the crusherhouse at its facilities in Guinea, subsequently causing business interruption losses. Halco, acting on behalf of CBG, gave notice to Marsh & McLennan in Pittsburgh of those losses. Proof of loss information was prepared in Pittsburgh in connection with those losses.

12. Halco maintains at its offices in Pittsburgh extensive documentation concerning the cause of the crusher house accident and the extent of the business interruption losses resulting from that accident. Neither CBG nor Halco maintains any documents on these subjects at

any other place in the United States or anywhere in England.

. . . .

Sworn to and subscribed be-
fore me this 5th day of
April, 1978.

Ernest A. Egyed,
Notary Public

My commission expires December 8, 1980

Exhibit B to said affidavit appears at page 426a, infra

AGREED STATEMENT IN LIEU OF REPRODUCING COVERS

The foregoing affidavits of Glynne-Jones, Prisco, Prior, Beadling, Doty, Hershey and Witney were filed by counsel for plaintiff under their blue cover.

[W.D. Pa. Title not printed]

[1] TRANSCRIPT OF PROCEEDINGS

of hearing held in the aforementioned action beginning at 3:15 p.m., June 14, 1978, before Honorable Paul A. Simmons, District Judge.

• • • •

[2] THE COURT: Now, this 14th day of June, 1978, the court will set July 27 at 2:00 in the afternoon in this courtroom as the time and place for argument in regard to the excess coverage defendants' motion for summary judgment at Civil Action 75-1567.

• • • •

[30] (The proceedings were thereupon recessed at 4:30 p.m. and resumed at 9:30 a.m., June 15, 1978.)

* * * *

[86] THE COURT: We had better address 7, 9 and 11 [of plaintiff's first request for documents]. Now, what about Number 7?

MR. BECK: Number 7 reads, "Copies of all business interruption insurance policies issued by Defendant during the period from January 1, 1972 to December 31, 1975. In the alternative, Defendant is requested to produce all standard forms, used by Defendant between January 1, 1972 and December 31, 1975, as sources for the drafting of business interruption coverage written by defendant."

THE COURT: Just so I can understand, Mr. Mellott, you mean he can answer it either way?

MR. MELLOTT: He can answer it either way. In fact, that is what INA did. They elected to give us the standard forms under the alternative in the second sentence.

THE COURT: Are you willing to do that?

MR. BECK: Your Honor, I have to raise the same objection as I raised before. The insurance policy in question as far as my defendants are concerned is an excess coverage policy. Now, what is being requested here is primary coverage business interruption forms, which, as far as the [87] excess carriers are concerned, is really not relevant.

THE COURT: Well, I have already said it is relevant because it would indicate or lead to other relevant evidence, perhaps. That is to say that it would indicate what your practice was and whether you as a prudent carrier would enter into this type of deal if you had language that was totally different. For example, that would certainly bear on your business practices.

MR. BECK: Well, again, you are talking about business interruption policies written for other situation, not this situation, and when you talk about policy language, the only policy language involved in these 26 carriers is a cover note and placing slips.

THE COURT: I know, but what he is asking for is not the coverage pertaining to this particular situation. He wants to know what your companies would have done if you had been a prudent insurer. Is that correct?

MR. MELLOTT: Well, that is part of it, Your Honor. They adopted the language in this case of the INA policy, there is no doubt, and they have practices and procedures and use of language and business interruption policies, and we think we have a right to find that out, and you have already ruled on that before.

THE COURT: I think it could lead to other information that would be relevant, so I think that is the [88] test. We are going to overrule your objections on Number 7.

* * * *

[W.D. Pa. Title not printed]

REQUEST FOR PRODUCTION OF DOCUMENTS

The plaintiff, Compagnie des Bauxites de Guinee, pursuant to Rule 34 of the Federal Rules of Civil Procedure, hereby requests that each of the defendants in the above-entitled action except Insurance Company of North America (hereinafter the "excess insurer defendants"), produce for inspection and copying on Wednesday, July 19, 1978, at 9:00 a.m. at the offices of Eckert, Seamans, Cherin & Mellott, 42nd Floor, 600 Grant Street, Pittsburgh, Pennsylvania 15219, all cover notes and/or insurance policies wherein any of the excess insurer defendants participated as an insurer and which cover notes and/or insurance policies were delivered in the Commonwealth of Pennsylvania and/or covered a risk located in the Commonwealth of Pennsylvania. This request is intended to include, but is not limited to, the insurance policies and/or cover notes referred to in paragraphs 1 and 2 of the Excess Insurers First Request for Production of Documents, all of which are within the possession, custody or control of the excess insurer defendants.

ECKERT, SEAMANS,
CHERIN & MELLOTT

By Robert W. Doty
Attorneys for the Plaintiff

[W.D. Pa. Title not printed]

OBJECTIONS OF EXCESS INSURER DEFENDANTS TO PLAINTIFFS REQUEST FOR PRODUCTION OF DOCUMENTS

AND NOW, come excess insurer defendants, above named, and object to Plaintiff's Request for Production of Documents and in support thereof sets forth the following:

1. It is denied that the excess insurer defendants documents for First Request for Production of Documents contained in paragraph two of request are within the possession, custody and control of excess insurer defendants. On the contrary it is averred that said documents are within the possession, custody and control of the plaintiff.

2. Documents referred to in paragraph one of excess insurer defendants' first request for production of doc-

uments are referred to in the exact manner in which they appear in the affidavit of Milton Beadling which was supplied by the plaintiff. These documents are not identified as to time, number or the name of the person allegedly insured. It is impossible for the excess insurer defendants to identify these documents and it is further averred that they are in the possession, control and custody of the plaintiff.

3. Plaintiff's request for production of documents is so broad in scope that the documents requested are not relevant, beyond the scope of discovery, the request is so broad and all inclusive as to be unduly burdensome and oppressive to excess insurer defendants.

WEIS & WEIS

By Thomas F. Weis
Attorneys for Defendants;

[W.D. Pa. Title not printed]

SECOND AFFIDAVIT OF MARK F. BRUCKMANN

MARK F. BRUCKMANN, ESQ., being duly sworn, deposes and says:

1. I am an attorney associated with Mendes & Mount, of counsel to the defendant excess insurers. I submit this second affidavit in further support of said defendants' motion for summary judgment dismissing the action against them.

2. I have just returned from London, England, where I had occasion to discuss the within motion and related matters with representatives of most of the defendant excess insurers.

3. With seven exceptions, the defendant excess insurers have submitted further affidavits in support of

the motion. Of the defendants moving for summary judgment on the ground that this Court lacks in personam jurisdiction over them, three defendants, L'UNION ATLANTIQUE, S.A., THE CENTURY INS. CO., LTD. and YUVAL, THE INS. CO OF ISRAEL were not available to execute further affidavits at the time of my visit. However, I did discuss the matter with representatives of CENTURY who assured me that affidavits similar in context to those submitted by the other defendants shall be forwarded in the near future. With the Court's permission, this additional affidavit will be submitted to Court upon receipt in the United States. Further, I verily believe that the contents of an affidavit by L'UNION and YUVAL would substantially follow those submitted by the other defendant excess insurers.

4. In addition, although I did not have an opportunity to consult with the four defendant excess insurers who join in the motion for summary judgment except for that portion addressed to the lack of in personam jurisdiction, namely EAGLE STAR INS. CO., HANOVER INS. CO., HOME INS. CO., LTD. and TUREGUM INS. CO., I verily believe that such insurers would attest to the same or similar facts and circumstances set forth in the other defendant excess insurers' further affidavits.

5. From my discussions with the defendant excess insurers, it is my understanding that the further discovery requested by plaintiff, particularly with respect to the production of all forms of business interruption policies referring to the language "design defects" and "mechanical breakdown" issued by said defendants in recent years, would entail a search of tens of thousands of documents which are in the possession of over 150 different London brokers.

6. With respect to plaintiff's contention that moving defendants have waived their objection to in personam jurisdiction, inasmuch as moving defendants did not in any way participate in any aspect of this suit prior to the service of their answer on December 31, 1975 and since such answer and subsequent amended answer asserted the affirmative defense of lack of in personam jurisdiction, said defense has not been waived.

7. With respect to moving defendant's position that plaintiff lacks capacity to bring suit in this forum said defendants were not aware of the extent of plaintiff's activities in the Commonwealth until plaintiff submitted its answering affidavits and brief, admitting to the extensive transaction of business in the forum without having obtained a certificate of authority.

8. Moreover, annexed hereto, made a part hereof and marked Exhibit A is a copy of correspondence received from plaintiff on what appears to be plaintiff's letterhead, clearly indicating that plaintiff maintained an office in Pittsburgh, Pennsylvania.

9. Also annexed hereto, made a part hereof and marked Exhibits B-1-2-3 are copies of: a February 4, 1974 telex, taken from the Bland Payne placement file subsequent to the commencement of this action, from Bland Payne to Marsh & McLennan, Pittsburgh, indicating tht the excess layer coverage was arranged as a reinsurance of a Guinean company; a telex dated March 15, 1974 from Bland Payne to Marsh & McLennan inquiring as to whether there was a direct or reinsurance placement of the excess layer; a telex response from Marsh & McLennan dated March 19, 1974 stating Marsh & McLennan's choice to have Bland Payne issue a direct cover on the excess layer and not a reinsurance contract. This demonstrates that the time defendant excess

insurers signed the placing slips, they did not know whether or not their involvement was as direct insurers or reinsurers of a Guinean company and could not possibly have wilfully availed themselves of the laws and protections of this Commonwealth.

For the reasons stated herein and in the affiant's first affidavit, it is respectfully urged that summary judgment be granted in favor of the defendant excess insurers.

MARK F. BRUCKMAN

[Jurat not printed]

Exhibit A to said affidavit appears at page 427a infra

* * * *

On July 21, 1978, representatives of twelve of defendant-cross-petitioners executed affidavits in substantially identical form but with the deletions, insertions and changes in paragraphs 14, 15 and 16 hereinafter specified. In addition, defendant Continental made an insertion in paragraph 12. The form of affidavit before execution, without paragraphs 14, 15 and 16, was as set forth on pages 73a-77a infra. Paragraphs 14, 15 and 16 for each of said twelve defendants and paragraph 12 for defendant Continental were as set forth on pages 77a-81a infra.

[W.D. Pa. Title not printed]

FORM OF AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION

________________, being duly sworn, says:

1. I have been an underwriter of risks placed through the London Market for ___ years and I am now an underwriter employed by defendant, ______________________ __________, having personal knowledge of the facts herein stated and have been duly authorized by said defendant to so state. Said defendant is a corporation organized and existing pursuant to the laws of __________ __________.

2. Said defendant has read the December 9, 1977 Affidavit of David Glynne-Jones and in addition to agreeing with his statement that "When the risk has been fully subscribed, for the benefit of the insured the broker prepares a cover note indicating the identity of the underwriter, the shares of their participation in the underwriting, and the basic terms on which they agree to provide coverage. In a placing of this kind, which refers to the wording of the underlying coverage, upon receipt of the underlying wording the broker prepares the excess policy for the approval and signature of the excess underwriter and then transmits it to the insured through the producing broker", also states that such represents a standard practice in the London insurance market.

3. Said defendant has no documents relating to the role of Marsh & McLennan Incorporated (Marsh & McLennan) and/or Bland Payne (International) Ltd. (Bland Payne) and/or any other broker and/or agent involved in providing business interruption coverage to C.B.G.

4. Said defendant has never, at any time since at least January of 1973, consented to have any Pennsylvania Office of Marsh & McLennan act on its behalf in any capacity.

5. Said defendant has never, at any time since at least January of 1973, entered into any written or verbal contract wherein any Pennsylvania Office of Marsh & McLennan would act on defendant's behalf.

6. Said defendant has never, at any time since at least January of 1973, supplied any Pennsylvania Office of Marsh & McLennan with any written, oral, or any other authority to act on defendant's behalf.

7. Said defendant has never, at any time since at least January of 1973, supplied any Pennsylvania Office of Marsh & McLennan with policies, forms, premium rates, stationary, seals or any other evidencies of any mutual relationship.

8. Said defendant has never, at any time since at least January of 1973, consented or authorised any Pennsylvania Office of Marsh & McLennan to collect premium on its behalf.

9. Said defendant was unaware, until sometime after the execution of Mr. Beadling's February 13, 1978 Affidavit, that Marsh & McLennan were maintaining it was defendant's agent.

10. Said defendant received its premium of U.S. $______ from Bland Payne, in London, in September 1974.

11. Said defendant specifically denies that any Pennsylvania Office of Marsh & McLennan were its agent at any time after January 1973.

12. Said defendant insures individuals and it covers risks on a world-wide basis.

13. Said defendant's records of insurance placed through the London market classify risks according to major geographic locations.

* * * *

17. Said defendant has no knowledge of where policies and cover notes are sent after a London broker has presented such for signature.

18. Said defendant states that under the standard practice in the London insurance market an Insurer does not receive a copy of a cover note prepared by the London broker.

19. Said defendant states that it has reviewed its records and has determined that it never received a copy of Cover Note 4093011 which was prepared by Bland Payne.

20. Said defendant was never given a copy of the Bland Payne placement file and was never aware, until some time subsequent to the commencement of this action, that C.B.G. was incorporated in Delaware, that Marsh & McLennan were involved in the placement of the coverage, that Halco Mining was a 51% owner of C.B.G., or that the underlying I.N.A. Policy did not contain a "Material Damage Warranty".

21. Said defendant states that it is the standard practice in the London insurance market to require a "Material Damage Warranty" in any business interruption policy which would have been prepared.

22. Said defendant states that a "service of suit" clause can consent to jurisdiction in any country and its

use is not limited to a submission of the jurisdiction of the United States of America.

23. Said defendant states that it is standard practice in the London Insurance Market to consent to the jurisdiction of the United States of America only when covering risks geographically within the United States of America.

24. Said defendant states that it has reviewed its records and has determined that it was informed by the London Broker, Bland Payne, that the risk was located entirely in Guinea, West Africa.

25. Said defendant further states that if a policy had been prepared by the London Broker, Bland Payne, and presented for signature, defendant would not have consented to a "service of suit" clause submitting to the jurisdiction of the United States of America.

26. Said defendant states that it has reviewed its records and determined that the phrase on the placing slip "as underlying as far as applicable" was never intended to consent to the jurisdiction of the United States of America.

27. Said defendant states that it has reviewed its records and determined that it negotiated the terms of the placing slip only with the London Broker, Bland Payne, and that all such negotiations occurred in London, England prior to its signing the placing slip in London, England.

28. Said defendant states that at the time of its subscription to the placing slip it was in full compliance with all the laws of Great Britain regulating Insurance Companies and was authorized pursuant to those laws to transact business in Great Britain.

29. Said defendant did not foresee and did not know that its initialling the placing slip would have consequences in North America or, in particular, Pennsylvania.

The Insurance Corporation of Ireland Ltd. per Leonard Francis Allison

14. Said defendant has reviewed its records for Jan. 1, 1977 to Nov. 1, 1977 and determined that only 9 risks involving $15,949.30 premium income are specifically identifiable as being located in Pennsylvania and such represent 0.06% of the gross premium income received through defendant's London Office.

15. [stricken]

16. Said defendant has reviewed its records for Jan. 1, 1977 to Nov. 1, 1977 and determined that only 877 risks involving L1,481,000 premium income are identifiable as being located in North America and such represents 10-73% of the gross premium income received through defendant's London Office.

16a. Said defendant has reviewed its records for 1974 and has determined that its premium income for risks located within Pennsylvania would have been substantially less than that received in 1977.

Continental Assurance Company of London, Ltd. per John Morris Humm

12. Said defendant insures individuals and it covers risks on a world-wide basis, excluding the United States of America, except incidental exposures.

14. [stricken]

15. [stricken]

16. Said defendant has reviewed its records for 1974/5 and determined that no risks involving any premium income are identifiable as being located in North America and such represents NIL% of the gross premium income received through defendant's London Office.

Slater, Walker Insurance Co., Ltd. per Keith Francis Arnold

14. Said defendant has reviewed its records for 1974 and determined that only 11 risks involving $3,055 premium income are specifically identifiable as being located in Pennsylvania and such represent 0.011% of the gross premium income received through defendant's London Office.

15. Said defendant is unable to determine precisely which of the risks covered in North America are located in Pennsylvania but believes such might be achieved by reviewing some 10,000 placing slips evidencing coverage of risks located in North America in which the defendant participated during 1974 which are in the possession of approximately 150 London brokers.

16. [stricken]

Yasuda Fire & Marine Insurance Co. (UK) Ltd. per Lord Grantley

14. [stricken]

15. [stricken]

16. Said defendant has reviewed its records for 1974 and determined that only ______ risks involving L600,000 approx. premium income are identifiable as being located in North America and such represents 60% of the gross premium income received through defendant's London Office.

Nichido Fire & Marine Insurance Co. Ltd. per Lord Grantley

14. [stricken]

15. [stricken]

16. Said defendant has reviewed its records for 19 and determined that only ______ risks involving L200,000 approx. premium income are identifiable as being located in North America and such represents 60% of the gross premium income received through defendant's London Office.

Sahar Insurance Co. Ltd. per Michael Wilson

14. [stricken]

15. [stricken]

16. Said defendant has reviewed its records since 1973 and determined that its U.S.A. business is minimal, less than one percent of its premium income.

Excess Insurance Co. Ltd. per William Griffiths

14. [stricken]

15-16. Said defendant has reviewed its records for 1974 and believes the premium imcome derived from risks located within Pennsylvania represents less than 1% of its gross premium income received through defendant's London Office.

Trident Insurance Co. Ltd. per James Andrew Kinahan

14. Said defendant has reviewed its records for and determined that only 40 risks involving premium income are specifically identifiable as being located in Pennsylvania and such represent 0.035% of the gross premium income received through defendant's London Office.

15. [stricken]

16. [stricken]

Stronghold Insurance Co. Ltd. per Ivan Peter Hammersley

14. Said defendant has reviewed its records and determined that at least January of 1973 it has not underwritten any property risks located within the U S of A specifically identifiable as being located in Pennsylvania and such represent ___% of the gross premium income received through defendant's London Office.

15. [stricken]

16. [stricken]

British Reserve Insurance Co. Ltd. per Peter Head

14. Said defendant has reviewed its records for 1977 and determined that only 31 risks involving premium income are specifically identifiable as being located in Eastern Sea Board and such represent 0.24% of the gross premium income received through defendant's London Office.

15. [stricken]

16. [stricken]

English & American Insurance Co. Ltd. per Reginald Arthur Heard

14. [stricken]

15-16. Said defendant has reviewed its records for 1974 and believes the premium income derived from risks located within Pennsylvania represents less than 1% of its gross premium income received through defendant's London Office.

Consolidated European Reinsurance Co. Ltd. per Roy Edwin Wood

14. Said defendant has reviewed its records for ____ ______ and determined that only 6 risks involving premium income are specifically identifiable as being located in Pennsylvania and such represent 0.02% of the gross premium income received through defendant's London Office.

15. [stricken]

16. [stricken]

[W.D. Pa. Title not printed]

I, JAMES ROLAND BLAKE FOX-ANDREWS of 4 Pump Court, Temple, London E.C.4, England, make oath and say as follows:

1. I was called to the Bar in England and Wales in January 1949. I was appointed Queen's Counsel in April 1968 and was made a Bencher of the Honourable Society of Gray's Inn in 1974.

2. For many years I have been extensively engaged in my professional practice with insurance law and I have had wide experience in the practices and usages in the London Insurance Market.

3. I recite shortly what I am informed and verily believe to be the material facts so that the basis of my conclusions may be appreciated.

4. Bland Welch & Co., Ltd., (Bland Welch) were Lloyd's Brokers.

5. The Insurance Corporation of Ireland (ICI) and twenty of the twenty-one following companies on the Placing Slip (Slip) for Policy No. 40930110000 were Underwriters ordinarily writing insurance business in the

London Insurance Market. The twenty-first, L'Union Atlantique S.A. (L'Union) ordinarily wrote business in the Brussels Insurance Market. The twenty two Insurers are hereafter called the excess Insurers.

6. On the 31st January, 1974 ICI initialled the Slip for a percentage of the risk. On or before the 23rd February, 1974 the said twenty following Insurers had signed the Slip and L'Union had signed a second Slip.

7. There is now produced and shown to me and marked "J.R.B.F.-A 1" a document which I am informed and verily believe is a true copy of the copy of the Slip at the time ICI initialled it.

8. Prior to ICI initialling the Slip, a copy of the Policy issued by the Insurance Company of North America (INA) was not produced to ICI. That Policy did not contain a "Material Damage" Warranty. INA at all material times wrote insurance business through the London Insurance Market.

• • • •

10. Prior to ICI initialling the Slip, Bland Welch provided them with the information contained in exhibit "J.R.B.F.-A 1" hereto. As appears therefrom the risk was situate solely in Guinea.

11. Prior to ICI initialling the Slip Bland Welch did not provide any of the following information:—

- (i) That the insurance had any United States connection;
- (ii) Exhibit "B" to the Affidavit of Mr. Glynne-Jones sworn on the 9th December, 1977;
- (iii) That U.S. Brokers were concerned with the placing of the Insurance;
- (iv) That the Assured were registered in Delaware or indeed any other State of the United States;

(v) That the policy issued by INA had been issued by them not on the London Insurance Market but at Philadelphia, Pennsylvania;

(vi) That the INA policy contained no Material Damage Warranty.

12. The fact that the insurance was described as Business Interruption and the cover expressed in U.S. Dollars gave no particular pointer to a United States connection.

13. The slip was first presented to ICI with a request that they lead the proposed risk.

14. Prior to each of the following twenty excess Insurers initialling the said Slip and to L'Union initialling the said second Slip, Bland Welch failed to provide to them or any of them any of the information set out in paragraph 11 hereof.

15. Further at the time the Slip was presented to the ICI it did not contain the name of the U.S. producing brokers. That name was added at a later date.

16. The premium was payable and was paid in London with the possible exception of L'Union.

17. The business was not entered as American business in the books of the second layer insurers.

18. On or about the 10th April, 1974 Bland Welch prepared the Cover Note which is exhibit "A" to Mr. Glynne-Jones' said Affidavit. Bland Welch did not seek ICI's approval to such Cover Note nor did they send a copy to ICI.

19. The contract made between CBG and the excess Insurers must necessarily have had only one proper law (i.e. one law applicable to the entire contract). This would be so notwithstanding that L'Union signed a sepa-

rate Slip. L'Union would undoubtedly follow ICI, the Leading Insurers, in all matters.

20. By English law the proper law of contract has to be determined by finding the intention of the parties. The proper law of the contract is the system of law by reference to which the contract was made or that which the transaction has its closest and most real connection.

21. If the facts were as above recited, the proper law is English. It is not suggested nor could it be reasonably suggested, that the law was that of the Republic of Guinea.

22. However, even if the excess Insurers had been aware of the identity and situation of the producing brokers, of the terms of INA's policy, the place where it has been issued, or of the fact the Insured were registered in the State of Delaware, the English Courts would be likely, in my view, nevertheless to hold that the proper law of the contract was English. The fact that the contract was made in England, that the premium would be paid in England, that payment would be made to English brokers in the event of a valid claim arising under the policy, would be strong presumptions in favour of such a finding. A stipulation "underlying as far as applicable" where the underlying is the INA policy issued in Philadelphia would not, in my view, be equated to a "follow Philadelphia" requirement and CBG's reliance upon the Armadora Occidental case has no relevance.

* * * *

30. The general rule as to a broker's position is defined in the decision in Anglo-African Merchants Ltd. v. Bayley 1970 (Q.B. 311). The Judge in that case was Megaw J. who had had wide commercial experience at the Bar and is now a Judge of the Court of Appeal. The material part of his passage commences at 322B which is

accurately summarised in the head note in these words:—

> "Both in Marine and in non-Marine Insurance that insurance broker is the agent only of the Assured whether in matters relating to the placing of the policy or in matters arising when a claim is made."

31. Some Insurers do of course employ agents or have arrangements with persons who obtain insurance business. This of course is not such a case. In some such cases such agents or persons will have the authority of their principals, the Insurers, to issue Cover Notes. Such Cover Notes of course as Mr. Glynne-Jones will well know are wholly different in nature from the Cover Note prepared by Bland Welch on or about the 10th April, 1974. Such Cover Notes are issued whilst a proposal of Insurance is being considered and *"before any contract of insurance is made."* They are for periods of short duration. Such a Cover Note is itself a contract of insurance.

32. See Generally Chapter 9 and in particular paragraph 4 of Ivamy (Op. Cit. P.94). At page 95 paragraph 7 Ivamy accurately sets out the nature of a broker's Cover Note namely:—

"Brokers Cover Note

Where the insurance is effected through a broker, the broker, pending the preparation of the policy issues a broker's Cover Note, certifying that the insurance has been effected and setting out its terms. By issuing the Cover Note, the broker does not incur liability upon the insurance, since he does not purport to be an Insurer. But he is to be presumed to warrant to the proposer that his instructions have been properly carried out, and that the insurance has been effected. If, therefore, there is no insurance in fact, he will be liable for breach of the warranty. Such a Cover Note is not binding on the Insurers."

Thus in preparing the Cover Note Bland Welch were acting solely as agents for CBG.

33. Had a policy been issued the brokers would of course have prepared the policy but would have done so as agents for the Assured. They would then have presented the draft to the Insurers for approval and if approved the Underwriters would have signed. An analogy is to be found in conveyancing matters. In the absence of special circumstances the purchaser's Solicitors draft the Conveyance and submit it for approval to the vendor's Solicitors. In so acting the purchaser's Solicitors are of course not acting in any way as the vendor's agents.

34. So far as premiums are concerned it is the usage of the London Insurance Market that a Lloyd's broker and Lloyd's Underwriter deal with each other as principals. See for example Ivamy (Op. Cit.) p. 530. An Underwriter cannot look to his Assured for the premium; he must look to the broker alone. See Ivamy p. 532. The fact that a broker in such circumstances is not the agent of the Insurers is well illustrated by the fact that a broker may not only sue his principal (the Assured) for the premium but he may do so notwithstanding that he has failed to pay the Insurers. See generally for a full consideration of this aspect paras. 438-441 of MacGillivray (Op. Cit.)

* * * *

JAMES FOX-ANDREWS

[Jurat not printed]

* * * *

[W.D. Pa. Title not printed]

TRANSCRIPT OF PROCEEDINGS

of hearing held in the above entitled actions on July 27, 1978, before Honorable Paul A. Simmons, District Judge.

[2] (The Following proceedings were held beginning at 2:00 p.m., July 27, 1978, before Honorable Paul A. Simmons, District Judge.)

THE COURT: Mr. Weis.

MR. WEIS: Your Honor, for the purposes of arguing this case, I would like to move the admission of Mary D'Amato. She is a member of the bar of the State of New York and also a member of the bar of the Second Circuit Court of Appeals.

THE COURT: Your motion is granted.

MR. WEIS: Thank you.

THE COURT: Is it Miss or Mrs.?

MISS D'AMATO: Miss.

Good Afternoon, your Honor.

At this point, we would like to submit further affidavits in support of our motion for summary judgement and reply brief addressed to the brief of the plaintiff. We have already supplied the plaintiff with copies of the affidavit and the brief.

THE COURT: Do you want to proceed with the argument?

MISS D'AMATO: Yes, your Honor.

* * * *

[43] THE COURT: All right. This deposition is part of the record?

MR. MELLOTT: It is part of the record, your Honor, [44] and I am reading from Page 17 of a deposition of Donald J. Mars. This is a question by me:

"Q Do I understand your prior answers correctly if I interpret them to be that 'business interruption' as such is not a term used in European policies of insurance?" "A It is not a term used in policies issued in Europe. There are many policies effective in Europe for multi-national companies where the insurance is backing or led back into the United States and there the term appear." "Q. So if the term 'business interruption' is used in a policy, it would be your experience that the insurance company knows that the coverage is being written for someone in the United States; is that correct?" "A That is correct. The term 'business interruption' would postulate an American form."

Later on he says at the bottom of Page 17 and continuing to Page 18, "If a company wrote a policy of insurance which was brokered to them as 'business interruption', I believe they would be on notice that they were dealing with an American form."

THE COURT: Let me consider this question. Is this man Mars, is he an expert in this field, qualified?

MR. MELLOTT: He has testified to something like I think 20 or 25 years experience, your Honor.

THE COURT: Multi-national insurance companies?

MR. MELLOTT: In the London market, and, furthermore, [45] we have an affidavit of Mr. Glynne-Jones of Bland and Payne to the same effect which we have submitted to your Honor. The business interruption is a term of art used in U.S. policies. In the policies in Europe and other parts of the world, they use the term "consequential loss." This is a "business interruption" policy, your Honor, and was brokered as such.

* * * *

[57] THE COURT: All right. I guess we are in line now to argue the second question about the discovery. Mr. Weis, are you going to argue it?

MR. WEIS: Yes. This is something I handled in my office, Your Honor.

THE COURT: Very good. You have submitted all your briefs, have you?

MR. WEIS: There is no brief on this, Your Honor.

THE COURT: Okay.

MR. WEIS: The plaintiff in its reply affidavits to the motion for dismissal, the argument that you have just heard, filed affidavits, two of which are very interesting when we are talking about agencies. One was from Bland and Payne, who gave them an affidavit that they say supports their position, and another one is very interesting that they gave an affidavit from Mr. Beadling, the agent here in Pittsburgh for Marsh & McLennan, who gives them an affidavit they say to support them, and it makes one wonder whose agent they are, but, anyway, in this affidavit filed by Mr. Beadling on Page 4 of his affidavit, he lists these defendants in this lawsuit or some of them or most of them, and beside them he lists the number of insurance contracts that he says that he wrote here in Pittsburgh.

[58] Now, before this come up for argument, I filed a motion for production of documents. I wanted to see those policies he is referring to, who he insured and what

is in them, and I got back not these policies and especially I wanted to see in there where these risks are located if they submit to jurisdiction. Is this a risk in Pennsylvania that they are going to cover? Sure, they are going to come in and submit them. Does this involve risks in the rest of the world? But they don't come back to us at all. Instead, we get objections to these and the other policies they refer to in another affidavit, "Oh, we have them too." We don't know what they are referring to. We can't find them and we want to get them to see if they support their position in that case.

THE COURT: Why don't you depose Mr. Beadling and ask him?

MR. WEIS: They filed the affidavit, your Honor. They filed a notice in there. They referred to writings, and I think it is incumbent on them when they file an affidavit and to attach thereto, the same as if you file a complaint or anything else in a lawsuit, when you file a writing, you are supposed to attach it, but I filed a motion to produce it and they didn't produce it.

THE COURT: You mean they didn't produce a document that Mr. Beadling referred to in his affidavit?

MR. WEIS: They did not produce those or other [59] documents that I requested too that Mr. Hershey referred to in his affidavit. I want to see the policies they are referring to.

THE COURT: Let's just stop at this point and ask Mr. Mellott to respond to that.

MR. MELLOTT: If the court please, in Mr. Beadling's affidavit we identified the policies involved by policy number, date, insured, et cetera. These are issued by the defendants. They are policies in their files. Is he telling the court that they can't take the policy number and go to their files and find the policy? I think that motion has no purpose. It was served very recently, your Honor. It had no purpose other than harassment. They had and have had for months this affidavit with the policy number on it. All they have to do is go to their client and say, "Pull that policy for us."

THE COURT: Is that correct, Mr. Weis?

MR. WEIS: I wish Mr. Mellott would look at the affidavit that was filed with us and tell us where that is. Look at what was served on us, Mr. Mellott, right there. The Beadling affidavit.

MR. MELLOTT: You asked about what was served on you. I am referring to Mr. Hershey's affidavit which was served the same time as Mr. Beadling's affidavit, your Honor.

THE COURT: Who is Mr. Hershey?

MR. MELLOTT: He is an attorney in my office. I am reading the same thing. Marine Package Policy No. 98335, [60] dated 12-2-71; assured: Alcoa Steamship Company, et al. Wreck Removal Policy No. 87514670, dated 5-27-75; assured, OFAB, and there is a host of them, your Honor. The policy numbers which they have had since April of this year. Since April of this year. I don't think they looked for them in their files, your Honor.

THE COURT: Did you mislay these policies, Mr. Weis?

MR. WEIS: No, sir. I am going to go back again, your Honor. We have two affidavits filed referring to two different series of policies. Now, let's first take Mr. Beadling. As I had it before, and my eyesight is not the best, but I would like to show that to the court and I would like to ask the court whether there is a number and a name listed beside those policies listed there.

THE COURT: Is it possible, Mr. Mellott, for this Marsh & McLennan Company to furnish these numbers for the policies on Page 4 of this affidavit of Mr. Beadling?

MR. MELLOTT: Well, if your Honor please, I believe they are the policy numbers in Mr. Hershey's affidavit.

MR. WEIS: No, sir.

THE COURT: It seems to me this is something we could solve very easily. It seems to me Mr. Beadling can certainly go to his files and get the numbers. Can't we compromise on that?

[61] MR. MELLOTT: Well, your Honor, I can do that. I can go to Mr. Beadling and ask him to give me the policies, but the fact is, your Honor, here they are asking us to produce policies which they themselves have written at the same time they are refusing to give me copies of all the policies they have written for assureds in Pennsylvania or covering risks in Pennsylvania or for brokers in Pennsylvania. They won't do that. They tell me it is too burdensome.

THE COURT: Well, maybe Mr. Beadling could help us out. He probably could go to these files and get these.

MR. MELLOTT: Of course he only has the ones in Pennsylvania and he can only tell me about the ones where I represent the insured. I mean he probably has some for other companies in Pennsylvania too. They have control over it. I don't.

THE COURT: Well, in order to do the research in order to make the affidavit, Mr. Beadling must have had these available.

MR. MELLOTT: He either has or had them available. I agree with that, your Honor.

THE COURT: Then why don't you give them to him and make him happy about that?

MR. MELLOTT: Well, will your Honor instruct them to produce for me all of the policies they have written covering risks in Pennsylvania?

[62] THE COURT: I can't see why that would be burdensome.

MR. MELLOTT: Then, your Honor, that takes care of the question today.

THE COURT: You have to give and take here.

MR. WEIS: I agree with your Honor, give and take, but, your Honor, my objection to that on the idea of being burdensome was there is just no restriction as to time. How far do we go?

THE COURT: What time limit? Within what period of time? You name what do you think is a reasonable time?

MR. MELLOTT: From 1971 to date.

THE COURT: That won't be bad. All right. Let's put on the record that the excess insurers, the 21 excess insurers will furnish the names of the policies and the numbers and sort of a general outline of the policies, not in detail, of all the policies they have written from 1971 to date.

MR. MELLOTT: Covering any contact whatever with Pennsylvania. Even if they claim the broker is the agent of the insured, I want to see that policy.

THE COURT: Well, they have said they will do that. Now, on the other hand, will you see Mr. Beadling and get him to furnish the numbers of these policies that he lists on Page 4 of his affidavit?

MR. MELLOTT: I will do that, your Honor.

[63] THE COURT: All right. That is settled, Now, what is the next point?

MR. WEIS: We have a problem were with that, your Honor.

MISS D'AMATO: Your Honor, if I may address myself to that—

THE COURT: You may. Go ahead.

MISS D'AMATO: The problem we have in obtaining the policies—and it is in Mr. Bruckman's affidavit and I believe Mr. Grace's affidavit that when the London insurers sign on the risk, they do that by numbers. The London insurers do not retain copies of the policies. The London broker has that policy. Therefore, ordering the excess insurers to get copies of these policies means that they had to go to over 150 London brokers and ask each broker to research his records for seven years.

THE COURT: Well, there is nothing wrong with that.

MISS D'AMATO: Your Honor, that is extremely burdensome. There are hundreds of thousands of documents.

THE COURT: But with form letters these days, you can put the information in the mail in a day with Xerox machines and address these companies.

MISS D'AMATO: In that instance, we would then further request that it be further limited that the time that is pertinent to the contents of the policy would only run from [64] say 1971 to the date in which the suit was filed. I don't see how the contents of the policy or the number of the policies issued subsequent to the time that this suit was filed would be relevant here.

THE COURT: Well, would you go along with that? I think she is right. We are only interested in what they are doing up to the time suit was filed.

MR. MELLOTT: Well, they may be doing business here now.

THE COURT: That is true, which of course would subject them to the jurisdiction.

MR. MELLOTT: Right.

THE COURT: I can't see why that is too burdensome, really. I think that can be done very easily.

MR. WEIS: It may take time, your Honor.

THE COURT: I will go along with time for you. What time do you want? How much? Do you need 60 days? It seems to me you can get this out very quickly.

MR. WEIS: I don't see how we could possibly have it in 60 days.

MR. McCONNELL: Knowing a little bit about the insurance market, you wouldn't scratch the surface in complying with that order in 60 days.

THE COURT: Just a minute. We are seeking your help here.

[65] MR. BECK: Your Honor, when we were here for a status conference—

THE COURT: Your name for the record?

MR. BECK: David Beck. I represented the excess insurers at the status conference, and we were ordered to produce certain documents for this argument, and the plaintiff's motion to produce No. 11, I believe it was.

Now, Mr. Bruckman has taken care of that and his affidavit we have submitted today indicates those documents aren't in our possession, but simply for that one matter, Mr. Bruckman spent 12 days in London solid visiting people just for that one matter, and it is miniscule compared to what you are asking for today.

THE COURT: Well, with form letters, I think you can do this. I don't think there is any problem.

MR. MELLOTT: Your Honor, this can be avoided if they will acknowledge that they are doing business in Pennsylvania and marketing their product in Pennsylvania, selling their insurance in Pennsylvania, taking premiums from people in Pennsylvania. That is the reason for this request.

THE COURT: Well, I think we have settled that now, except for the time problem. What is the time frame that you need to do this?

MR. WEIS: Your Honor, could we start with 90 days, and if we run into trouble, we will come in.

THE COURT: Ninety days. If you run into trouble, [66] I am sure Mr. Mellott is going to be reasonable.

MR. MELLOTT: That is right, and I am sure your Honor is going to be, but on this one point, just let me say my associate has just looked at one of the affidavits they filed. In that, the particular insurance company has already identified these policies. They shouldn't need much time. I am referring to Paragraph 14 of the affidavit that they have just filed of Roy Wood for Consolidated European Reinsurance Company.

* * * *

[W.D. Pa. Title not printed]

PETITION FOR EXTENSION OF TIME TO ANSWER INTERROGATORIES

AND NOW, come the defendants above named, not including Insurance Company of North America, and request an extension of time within which to answer interrogatories propounded to them by the plaintiff.

1. The interrogatories referred to were to be answered by October 25, 1978.

2. At the time the Court fixed this date for answers to interrogatories, counsel for the defendants advised the Court that it may not be possible to answer the interrogatories by that date due to the difficulty that may be encountered in securing the information requested.

3. Counsel has sought to secure the information necessary to answer plaintiff's interrogatories and will probably be able to complete the answers within thirty days from this date.

WEIS & WEIS

By Thomas F. Weis

[W.D. Pa. Title not printed]

NOTICE

TO: Robert W. Doty, Esq.
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant St., 42d Fl.
Pittsburgh, PA 15219

Randall J. McConnell, Esq.
3180 U.S. Steel Building
Pittsburgh, PA 15219

TAKE NOTICE that the within Petition for Extension of Time To Answer Interrogatories will be presented on Wednesday, October 25, 1978.

WEIS & WEIS

By: Thomas F. Weis

* * * *

[W.D. Pa. Title not printed]

ORDER OF COURT

AND NOW, to-wit, this 8 day of November, 1978, it is hereby Ordered, Adjudged and Decreed that defendants be granted an additional thirty (30) days within which to answer interrogatories propounded by the plaintiff.

PAUL A. SIMMONS

[W.D. Pa. Title not printed]

THIRD AFFIDAVIT OF MARK F. BRUCKMANN

MARK F. BRUCKMANN, ESQ., being duly sworn, deposes and says:

1. I am an attorney associated with Mendes & Mount, of counsel to the defendant excess insurers. I submit this third affidavit in further support of said defendants' motion for summary judgment dismissing the action against them.

2. Pursuant to this court's order on July 27, 1978, we attempted to obtain copies of insurance policies regarding Pennsylvania business for the period of January 1, 1972 through December 31, 1977.

3. The excess insurer defendants do not, as stated in their afidavits heretofore submitted to the court in con-

junction with said defendants' motion for summary judgment, prepare or receive copies of insurance policies.

4. The excess insurer defendants do, as stated in their aforesaid affidavits, maintain records according to geographic location of risk.

5. Defendant excess insurers geographic risk indexing is by continent, country or other large area and is not by individual states of the United States of America.

6. The excess insurer defendants are unable, without reviewing approximately 4,000,000 files, to determine if the insured risk was derived in some fashion from Pennsylvania.

7. Fifteen of the excess insurer defendants have been individually contacted and, as stated in exhibit "A" attached to this affidavit, each maintains its records according to geographic location. Further, said exhibit indicates the number of documents which are available for inspection and gives their location. Each defendants' willingness to make said records available for inspection by plaintiff's counsel is also noted.

8. Inspection of the aforementioned files would confirm each excess insurers' affidavit regarding the number of insured risks geographically within Pennsylvania.

MARK F. BRUCKMANN

[Jurat not printed]

Exhibit A appears at pages 428a-429a infra

* * * *

[W.D. Pa. Title not printed]

PLAINTIFF'S MOTION TO COMPEL EXCESS INSURER DEFENDANTS TO PRODUCE DOCUMENTS AS PREVIOUSLY ORDERED BY THIS COURT

Plaintiff Compagnie des Bauxites de Guinee (CBG) moves for an order directing the Excess Insurer Defendants (*i.e.*, all defendants with the exception of the Insurance Company of North America) to produce documents forthwith in accordance with this Court's order of July 27, 1978. The documents to be produced are all insurance policies or cover notes issued in or after 1971 under which any of the Excess Insurer Defendants provided insurance coverage

(a) to insureds located in Pennsylvania, or

(b) on risks looated in Pennsylvania, or

(c) through brokers located in Pennsylvania.

These documents, when produced, will demonstrate that the Excess Insurer Defendatnts have deliberately engaged in a consistent course of business in Pennsylvania and are therefore subject to the *in personam* jurisdiction of Pennsylvania courts under the Pennsylvania longarm statute which was in effect when this action was commenced.

In further support of its motion, CBG states as follows:

1. Due to the delays of the Excess Insurer Defendants, the question of this Court's *in personam* jurisdiction over them, in this case which was filed in 1975, is not likely to be decided until sometime in 1979. The Excess Insurer Defendants waited until May 20, 1977, some 17 months after filing of the complaint and of their answer, before filing their summary judgment motion challeng-

ing the *in personam* jurisdiction of this Court. When their motion was finally argued on July 27, 1978, the Court ordered them to produce the information sought in this motion and gave them 90 days to do so. Though the 90 days expired on October 25, 1978, one month ago, the Excess Insurer Defendants have not yet responded. This pattern of delay is completely inconsistent with the requirement that the question of *in personam* jurisdiction be determined at the outset of litigation.

2. We note that on or about October 25, 1978 the Excess Insurer Defendants sought a 30-day extension within which to answer interrogatories and that on November 8, 1978 the Court signed an order granting their request. In fact no interrogatory answers are presently due from them, the Court having already extended the time for answering outstanding interrogatories until after a ruling on the Excess Insurers' summary judgment motion. What is now due, overdue, is a response to the Court's order of July 27, 1978 that the Excess Insurer Defendants produce documents which will demonstrate the extensive business done by the Excess Insurer Defendants in Pennsylvania since 1971.

3. In addition to the question of *in personam jurisdiction* the Excess Insurer Defendants have belatedly raised the question of CBG's capacity to sue in Pennsylvania courts. Because the Excess Insurer Defendants failed to raise this argument in their answer or by motion prior to filing their answer, they have waived their opportunity to challenge CBG's capacity to sue in Pennsylvania courts. Even if the question were properly before this Court, the Excess Insurers' position is without legal merit.

4. If a judgment were to be rendered by this Court against the Excess Insurer Defendants in this case, that

judgement would be fully enforceable against the Excess Insurer Defendants in England. It is clear under English law regarding the enforcement of foreign judgments that such judgments are enforceable, without question as to the jurisdiction of the foreign court over the English defendant, when the English defendant filed an answer on the merits of the case, as the Excess Insurer Defendants have done here.

5. In 1974, CBG suffered losses as a result of the incident involved in this case of over $20,000,000, and those losses were insured by the Defendants in this action. CBG seeks reimbursement of those losses as the earliest possible time, without further delay and procrastination by the Excess Insurer Defendants.

WHEREFORE, CBG moves this Court for an order directing the Excess Insurer Defendants to produce the aforementioned documents forthwith, upon penalty of the sanctions permitted by Rule 37 of the Federal Rules of Civil Procedure.

CLOYD R. MELLOTT
DALE HERSHEY
ECKERT, SEAMANS,
CHERIN & MELLOTT

Attorneys for Plaintiff

Dated: November 27, 1978

* * * *

[W.D. Pa. Title not printed]

ANSWER TO PLAINTIFF'S MOTION TO COMPEL EXCESS INSURER DEFENDANTS TO PRODUCE DOCUMENTS

Defendant, excess insurers, file this Reply to Plaintiff's Motion to Compel Production of Documents received on November 28, 1978 and in support of this Reply, the defendant, excess insurers, state as follows:

1. Defendant, excess insurers, deny the allegations and statements made in paragraph No. 1 of Plaintiff's Motion and state to the contrary that an Affidavit and Exhibits attached thereto were filed with this Court on November 24, 1978 and copies of said documents were previously served by Thomas F. Weis upon counsel for the plaintiff on November 24, 1978. Further, a copy of said document is attached to this Reply and made part hereof and is marked Exhibit "1". A review of that document shows that the information concerning risks located in Pennsylvania has been previously submitted to the Court and to opposing counsel in the form of affidavits in support of Motion for Summary Judgment.

2. The affidavit filed November 24, 1978, states that it is not possible to determine if a broker in Pennsylvania was in any way involved with the placing of insurance with any of the defendant excess insurers without reviewing approximately four million files.

3. The defendant, excess insurers, are willing to make these four million files available to plaintiff's counsel for their review at the location given in the affidavit filed on November 24, 1978.

4. The defendant, excess insurers, deny that they have waived the question of in personam jurisdiciton or

that they had failed to raise this issue by way of Answer. To the contrary, this issue was raised in both the original Answer by these defendants and the Amended Answer filed by these defendants. Therefore, this question is presently before the Court and defendant, excess insurers, Motion should be granted.

5. The defendant, excess insurers, deny that a judgment by this Court would be fully enforceable against those excess insurer defendants who are not subject to the jurisdcition of this Court.

6. The defendant, excess insurers, deny that they have in any way procrastinated or unduly delayed the production of the information required by this Court. To the contrary, contact has been made with the excess insurer defendants in order to provide the information in the affidavit filed November 24, 1978, and in the previous affidavits which have been filed with this Court. The excess insurer defendants have acted in good faith and have complied with the Order of this Court.

WHEREFORE, the excess insurer defendants request this Court to deny the request for sanctions filed by the plaintiff.

Respectfully submitted,
WEIS & WEIS

BY DAVID L. BECK
Counsel for Excess
Insurer Defendants

[W.D. Pa. Title not printed]

PROCEEDINGS

of STATUS CONFERENCE in the above-entitled action, December 21, 1978, at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons.

[2] (December 21, 1978, 1:30 o'clock p.m.)

(In Court Chambers)

THE COURT: All right, Mr. Bruckmann.

MR. BRUCKMAN: Eagle Star Insurance Company the Hanover Insurance Company, the Home Insurance Company and Turegum Insurance Company.

THE COURT: Now, just for the record, you are on the record saying that the ones that you just recited the names of the companies you just recited—you admit jurisdiction as to those companies?

MR. BRUCKMANN: Let me just clarify a little bit, your Honor.

The first three I mentioned are registered to do business in Pennsylvania—I believe they are registered to do business in Pennsylvania. The Turegum Insurance Company is not participating in the motion for summary judgment for business considerations; primarily because it is a surplus lines insurer.

THE COURT: That "surplus lines," you mean excess insurer?

MR. BRUCKMANN: It's not quite the same. They are registered in Pennsylvania as a licensed surplus lines insurer.

* * *

[12] THE COURT: So, what you are saying is, that 17 of them do do business in Pennsylvania then?

MR. BRUCKMANN: They have in the past insured risks in Pennsylvania, and we contest that that is not sufficient predicate for the exercise of in personam jurisdiction.

MR. MELLOTT: And, your Honor, the order that you entered in response to our request was for us to have a chance to look at the documents they have written and let you make the decision based on it. We believe that if they are doing business at all in Pennsylvania, they are subject to the Long-Arm Statute in Pennsylvania.

In fact, all they really have to do is be getting pecuniary benefit fron Pennsylvania.

THE COURT: They admit that as to 17.

MR. MELLOTT: Well, that is the reason I asked the question before. And even as to some of these he referred to, he just said in a couple of years, in '74 and '75, for example, they didn't write business. Now, one of the problems I have with the way he stated it, though, is that [13] sometimes he said there was no risk here—sometimes he said there was no business here.

And, you know, it's also very interesting that these statements can be made in affidavits and here today, which must have required some review of the files they had in order for someone —

MR. BRUCKMANN: That is quite correct. They have an index system based on geographic location of risk segregated into major geographic areas (North America, Africa). This particular risk was classified in West Africa, having no United States connection.

MR. MELLOTT: When you say geographic area of risk, does this include the name of the insured?

MR. BRUCKMANN: The records that I personally saw were a brief index card having the name of the assured and the location of risk.

MR. MELLOTT: I used "insured." I guess we mean the same thing by that?

MR. BRUCKMANN: Yes, we do.

MR. MELLOTT: Do they also show the name of the broker, or brokers, involved?

MR. BRUCKMANN: They do not.

MR. MELLOTT: So, even the files you looked at wouldn't tell whether a policy then was written through a Pennsylvania broker, I take it?

MR. BRUCKMANN: They do not. We would [14] have to go back to the original placing slip, which are the four million documents we have listed here, to check that.

MR. MELLOTT: Well, it seems to me, your Honor, that as long as they are contesting the question of whether they are doing business here in this jurisdiction they should comply with Your Honor's order.

MR. WEIS: Your Honor, could I make one other point here?

THE COURT: Help yourself.

MR. WEIS: A Defendant, to be subject to in personam jurisdiction, that is, a corporate Defendant or someone doing business, must be doing business in Pennsylvania at the time of the purported service of process. So, a lot of these things that happened before December of '75 and after December '75 really aren't relevant to the case.

Maybe that's the problem: we're trying to cover too big an area in time.

MR. MELLOTT: Your Honor, if a policy is issued in a particular year and they continue to collect premiums on it in later years, they are still doing business here, in my judgment.

MR. BRUCKMANN: There should be a slight distinction there, whether you are claiming personal jurisdiction based on an act arising out of a contract, or whether these Defendants are doing business overall in Pennsylvania: an isolated act or systematic course of business.

[15] MR. MELLOTT: I think the cases that we have cited in our brief will make it very clear that if you are doing business in Pennsylvania, and an insurance company writes a policy, they write one policy in Pennsylvania. If one company comes into Pennsylvania and writes an insurance policy on my life and someone else has a claim and I'm still paying premiums on it, they are doing business in Pennsylvania and they are subject to suit.

MR. BRUCKMANN: I agree with that, your Honor. The problem is with this that the risk was in West Africa; there was no Pennsylvania contact.

THE COURT: Just a minute now. See, think a little bit. Whether this risk per se had a connection in Pennsylvania is immaterial if you were doing other business in Pennsylvania.

MR. BRUCKMANN: But the tests are different, your Honor.

MR. MELLOTT: That is what I am saying.

MR. BRUCKMANN: He is quite correct, but for the latter test you have a systematic course of business. An isolated contact here or there, or a small percentage of business, is insufficient under the due process requirements.

Perhaps, the easiest thing to do is, if we agree that some of these Defendants write one per cent of their premium income, which we have already stated, why do [16] you need the policy? We already have the volume; that we have told you how much they write. What do you need —

MR. MELLOTT: Sofar as I am concerned, to the extent that any Defendant will acknowledge that the motion for summary judgment should be denied as to it, they need not make the search for these documents. I'm talking about excess insurer Defendants.

MR. BRUCKMANN: All right. But we've already agreed—we have stated that some of these companies write Pennsylvania business in less than one per cent of their premium income.

If, according to your argument, that is sufficient, why do we have to produce the documents at all? What do you need them for?

MR. MELLOTT: Because I am not satisfied. In view of some of the other statements in the affidavits, that, obviously, I can't believe, I am not willing to accept your representation that one per cent is all they are doing.

MR. BRUCKMANN: Well, what good is it to research the documents if you don't believe us no matter what we say?

MR. MELLOTT: Because if we see the files, I will know what policies you are writing.

MR. BRUCKMANN: The files are available and it's your burden to prove in personam jurisdiction.

[17] MR. MELLOTT: You were ordered in the end of July (over almost five months ago now) to produce these documents. In four months, you did nothing except write a two-page affidavit.

MR. BRUCKMANN: That is not true. Your Honor, we made a good faith effort. We contacted as many Defendants as we can. They are located in individual offices throughout London. Different dates to see them have to be scheduled. You have to sit down with the proper manager and discuss the problem.

THE COURT: Then, is your answer now, as to why you failed to get this, that you need more time or you can't get the information?

MR. BRUCKMANN: It depends on how the order is framed, your Honor. For risks physically within Pennsylvania, we've already gone through and stated the number and the amounts. As to whether we can get policies for that, we can make a good faith effort to go back and produce them. But to try and determine what business, as to where a broker might start out in Pennsylvania by calling a London broker, would require a review of all the documents, and I don't see that's necessary if we have gone through and already indicated that some of these companies have done business in the past. Mr. Mellott says that is sufficient for personal jurisdiction, we say it is not. Maybe that is sufficient. We have the percentage, and maybe [18] we should just use that.

MR. MELLOTT: Your Honor, as I said before, to the extent that they will acknowledge that the motion for summary judgment should be denied as to any particular excess insurer Defendant, I would be willing that that Defendant not be required to comply with the order for production.

THE COURT: Well, page 16 of the record indicates what we were talking about. Mr. Mellott said what he wanted was copies of all policies they have written for insureds in Pennsylvania or covering risks in Pennsylvania or for brokers in Pennsylvania. Very specific.

MR. BRUCKMANN: It's the latter problem we have, the broker in Pennsylvania. Because we cannot tell, simply by looking at a placing slip, or going to the broker file, necessarily that it's a Pennsylvania broker.

THE COURT: If you go to the broker file, you would know whether he was in Pennsylvania or not.

MR. BRUCKMANN: No. It can be an intermediary broker.

MR. HERSHEY: Your Honor, the placing slip in the case of this business interruption coverage has, in the upper left-hand corner, "Marsh & McLennan, Pittsburgh, Pennsylvania."

MR. BRUCKMANN: That is correct, and that was put on after the coverage was fully subscribed, as [19] stated in the affidavits by each of the Defendants. That was not there when they signed the coverage. They had no knowledge Marsh & McLennan was involved. They had no knowledge this was in any way connected to the United States of America. They were told the risk was in Guinea, West Africa. That was it.

MR. HERSHEY: The question is whether now, looking at the placing slips, it would be possible to tell whether the business reflected on that slip came from a Pennsylvania broker.

MR. BRUCKMANN: If it simply says "Marsh & McLennan," they have a hundred and some odd offices throughout the United States.

MR. HERSHEY: It says "Marsh & McLennan, Pittsburgh, Pennsylvania."

MR. BRUCKMANN: Well, that is possible. I do not know that every placing slip will have that notation on it; this one did, though.

THE COURT: I will tell you what we're going to do. I can see that you haven't even made any effort to get this information up to this point. You are still in the preliminary stage of trying to assemble the various brokers, and what not, and you said you have to make appointments to see them, and things like that.

MR. BRUCKMANN: We have done that, your Honor.

[20] THE COURT: Is there a fruition as a consequence? Have you actually contacted the brokers?

MR. BRUCKMANN: Yes, your Honor, we have contacted these —not the broker. We have contacted our clients and they told us that—

THE COURT: Who are the clients? You mean the 21 —

MR. BRUCKMANN: Each of the Defendant insurers. And they have pointed out the problems. They would have to review —

THE COURT: We're not talking about the problems they have. We want them to surmount their problems and get this information.

MR. BRUCKMANN: They have to review each placing slip individually.

THE COURT: Well, all right. How long is it going to take them to do this, to get the information?

MR. BRUCKMANN: There are four million placing slips for the period in time, your Honor.

THE COURT: You know, if you have a lot of different companies, it doesn't take long to look through that. You could look through a telephone book in a matter of a couple of days, and it would have a million names in it.

MR. BRUCKMANN: But each placing slip will have to be pulled individually, looked at, and then it [21] may or may not —depending on the—

THE COURT: How long is it going to take you to do this? That is all I want. You told me you could do it. Nobody objected to it at the time.

MR. BRUCKMANN: Well, we did not know the extent of the files at that time, your Honor. And we are trying to comply by saying these documents are available for inspection. And the question comes in, that if we have already admitted that a certain percentage of the business comes from Pennsylvania, would it make any difference if it's one or two percent. Under Mr. Mellott's theory it makes no difference —

THE COURT: Mr. Mellott, are you willing to go along with this infinitesimal percent, regardless of what it is? If there isn't any—

MR. MELLOTT: Your Honor, you know, I don't know.

THE COURT: In other words, you haven't much faith in your theory?

MR. MELLOTT: Oh, no. I have faith in my theory, your Honor. But I think I have the right to show the extent to which they are doing business in Pennsylvania.

THE COURT: Just in case?

MR. MELLOTT: You know, it's surprising to have Mr. Bruckmann sit here and tell your Honor that he doesn't know what's in these files. He hasn't gotten into them, [22] so he doesn't know, really, when he filed the motion for summary judgment in May, 1977, whether they were doing business in Pennsylvania or whether they weren't. He really hadn't analyzed the files to see the extent to which they are doing business in Pennslyvania.

MR. BRUCKMANN: We know the percentage was very small. We submit that is not sufficient. Predicated on the Constitutional due process requirements, it is not sufficient. That is our whole argument, your Honor. And there are some companies that write no United States business.

THE COURT: Well, if that is your whole argument, then you are going to have to get what I told you to get, because it's a quantitative defense that you are raising here.

MR. BRUCKMANN: Well, we say it's very small, and—

THE COURT: It's a defense of lack of jurisdiction. What type of a defense is that?

MR. BRUCKMANN: Well, I think the burden is on the Plaintiff to prove personal jurisdiction under the cases in the Eastern and Western Districts of Pennsylvania. And we are making these documents available, and if they want to test the percentages, I think they have the burden of reviewing them, your Honor. They are available.

THE COURT: Well, I have already made [23] my ruling. Now, the question is how do I enforce it? I don't want to be unduly harsh, but you have, I don't think, made a conscientious effort to get this information up this point.

Let me tell you something: For you to know what the percentage was that you are reciting, you would have had to have done this already.

MR. BRUCKMANN: What we have done, your Honor, these were for risks physically within Pennsylvania and for Pennsylvania assureds. It did not consider a risk that somehow came or passed through a Pennsylvania brokerage house; this is the problem.

The documents, other than placing slips, were reviewed. An index system gave us the percentage.

THE COURT: All right, I will tell you what I am going to do. I am going to give you 60 days to get this information to Mr. Mellott, as you had promised. See, you promised to go ahead and do this. And if you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume, under Rule of Civil Procedure 37(b), subsection 2(A), that there is jurisdiction. That's what I am going to do.

MR. BRUCKMANN: Your Honor, could I make one suggestion?

[24] THE COURT: Now, that means I am giving you almost a year to get this together.

* * * *

[37] So, Let's go on to something else. Now, [38] I am going to give you two months to get this material. If you don't have the material in six months, I am going to assume that the issue is in favor of the Plaintiff and that there is jurisdiction under Rule 34.

Pardon me?

MR. MELLOTT: Well, you said six months there, your Honor. Do you mean two plus the prior four or did you mean an additional amount of time?

THE COURT: Well, I was thinking of 60 more days on top of the four months.

MR. MELLOTT: That's what I thought. So you meant a total of six months?

THE COURT: Six months, yes. They have already started some of it, as I understand it.

MR. MELLOTT: All right.

THE COURT: Gosh. They ought to be able to get all of this done in six months; that is a half a year. Don't you think I have been pretty liberal? Gracious. I mean, you folks came in here and agreed to all of this. I didn't tell you —

MR. BRUCKMANN: At that time, we didn't fully understand the problems we'd have in reviewing these documents.

THE COURT: So, now under 37(b)(2)(A) I will assume that jurisdiction is here. I will assume that [39] jurisdiction is here with this court unless you produce statistics and other information in that regard that would indicate otherwise.

MR. BRUCKMANN: Does that include the period after the filing of the Complaint, your Honor?

THE COURT: Well, we said from '71 to the present. That's what we all agreed on. That was up to July 27th, '78. That's what we all agreed to.

MR. BRUCKMANN: The latter period should not —

THE COURT: Pardon me?

MR. BRUCKMANN: The period following the filing of the Complaint should be of no relevance.

MR. MELLOTT: That point was argued.

THE COURT: I said it and nobody even complained. That's the problem, you see. You put the Court in an embarrassing position whenever you want me to reverse myself constantly.

> "All right. Let's put on the record that the excess insurers, the 21 excess insurers—" I'm reading from 62 of the record, which was on July 27th, 1978—"will furnish the names of the policies and the numbers and sort of a general outline of the policies, not in detail, of all the policies they have written from 1971 to date." And in context, the context was Mr. Mellott's statement back on 61 that: "they [40] are refusing to give me copies of all the policies they have written for assureds in Pennsylvania or covering risks in Pennsylvania or for brokers in Pennsylvania."
>
> Those are the things we want. We want all the policies from '71 to date where you wrote—any of these 21 people through brokers wrote policies of insurance for assureds in Pennsylvania—or insureds, if you want, so we won't have any problem on that—or covering risks in Pennsylvania or for brokers in

Pennsylvania; those three types of policies from 1971 to date, and including the 21 excess insurers. You are to furnish that information.

Now, I give you two more months to get that information.

MR. BRUCKMANN: Do we still need the ones for the Defendants not participating in the motion to dismiss; the four that —

THE COURT: Well, what about the one of them you were sort of temporizing on?

MR. BRUCKMANN: Well, we'd have to produce it for that one, of course, but the three that are acknowledged to do business —

THE COURT: The three you spoke of were Continental Insurance —

MR. WEIS: No.

THE COURT: No? Excuse me.

[41] MR. WEIS: They don't do business at all.

THE COURT: Eagle Star, Hanover and Home Insurance. And you temporized on Turegum. Now, what do you want to do on them?

MR. BRUCKMANN: We'll have to produce the documents on Turegum, but not for the first three because they have already consented to jurisdiction.

MR. MELLOTT: Do they also consent, I mean, to the refusal of their motion on the ground of forum non conveniens?

MR. BRUCKMANN: No. That is a separate issue.

MR. MELLOTT: All right. I still believe, your Honor, that the extent to which they are doing business in Pennsylvania is relevant on that one too; that is why, when I asked the question originally, I said to the extent that any defendant, any excess insurer Defendant, is willing to agree that their motion for summary judgment should be denied — and I was covering both points — then they don't have to — I would not request that they comply with this. But —

MR. BRUCKMANN: But, we have already —

THE COURT: Well, Eagle Star, Hanover and Home and Turegum, they will furnish the information too, so we won't have any problems. So, we'll get it all done.

[42] You get 60 more days to get this in. And I have already told you of the sanction I am going to impose if the information is not forthcoming.

MR. BRUCKMANN: Yes, your Honor.

THE COURT: Then, I think we might as well have a status conference at the end of that 60 days to determine what to do.

(Discussion off the record.)

THE COURT: Any problems that develop out of the information will be taken up at that conference, which will be on April the 2nd at 10 a.m., I guess. Yes, April 2nd at ten o'clock.

MR. MELLOTT: All right. Your Honor, if they do produce these documents, we'll, of course, then be filing a reply brief in connection with the motion following that.

THE COURT: And you will be entitled to reply, and then we'll take up any discussion or argument of that on April 2nd.

MR. MELLOTT: All right, your Honor.

THE COURT: All right. Now, get busy and get this information, okay?

MR. BRUCKMANN: Yes, your Honor.

THE COURT: You can do it. You agreed to it before, back on the 27th of July.

* * * *

[W.D. Pa. Title not printed]

PROCEEDINGS

of Arguments on Motions* in the above-entitled action, February 8, 1979, at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons.

[2] (February 8, 1979, 4:33 o'clock p.m.)

(In Open Court)

* * * *

[62] MISS D'AMATO:

In our view, certainly CBG is transacting business, certainly in Guinea, because that where it's mining the ore, but also in Pennsylvania where there's a corporate trust: there is the direction of the corporation from Pennsylvania. The President testified that he made executive decisions from Pennsylvania; that significant books and records, minutes from the Board of Directors, were kept in Pennsylvania; there may be a bank account in Pennsylvania; HALCO was paid in Pennsylvania; in fact, the insurance, which is the subject of the law suit, was procured in Pennsylvania.

*[including defendants' motion to dismiss for plaintiff's lack of capacity to sue]

[W.D. Pa. Title not printed]

DEFENDANTS' LETTERS TO BROKERS AND BROKERS' RESPONSES

A copy of the letters sent by defendents to the London brokers appears at page 430a, infra. Copies of examples answers received from the brokers, and copies of certain documents produced by certain of the defendants, appear at pages 431a-476a, infra.

* * * *

[W.D. Pa. Title not printed]

MOTION FOR ORDER DUE TO FAILURE TO MAKE DISCOVERY

In light of the failure of Excess Insurer Defendants to comply with this Court's discovery orders of July 27, 1978, November 8, 1978, and December 21, 1978, Plaintiff moves this Court for an order, under Rules 37(b)(2) and 37(d) of the Federal Rules of Civil Procedure, providing as follows:

1. It shall be deemed for purposes of this action that the Excess Insurer Defendants have been and are knowingly and intentionally engaged in the conduct of business in Pennsylvania sufficient to give this Court *in personam* jurisdiction over them.

2. It shall be deemed for purposes of this action that from January 1, 1971 to the date of the order the Excess Insurer Defendants have knowingly and intentionally engaged in business in the Commonwealth of Pennsylvania by writing insurance coverage for insureds located in Pennsylvania, by covering risks located in Pennsylvania, by writing coverage through Pennsylvania insurance

brokers, and by maintaining business agents in Pennsylvania.

3. The Excess Insurer Defendants shall be precluded from opposing or denying Plaintiff's contention that this Court has *in personam* jurisdiction over the Excess Insurer Defendants due to their knowing and intentional conduct of business in Pennsylvania.

4. The Plaintiff need offer no proof with respect to the foregoing facts, which shall be deemed true, for purposes of this action, without further proof.

5. There being no further issue in the case as to the manner of the Excess Insurer Defendants' conduct of business in London as opposed to Pennsylvania, and there being no substantial number of documents and witnesses in London relevant to the remaining issues in the case, and in light of the length of proceedings already conducted in this forum, the presence of another defendant in this forum, and the substantial number of documents, witnesses and counsel located in this forum, the Western District of Pennsylvania is a more convenient forum within which to hear this suit than any other forum, including London.

6. In light of the foregoing facts, deemed to be true for purposes of this action, the summary judgment motion filed by the Excess Insurer Defendants alleging a lack of *in personam* jurisdiction and alleging *forum non conveniens* is hereby denied.

7. The Excess Insurer Defendants shall pay to the Plaintiffs the Plaintiffs' reasonable expenses, including attorney's fees, caused by the failure of the Excess Insurer Defendants to comply with the Court's orders of July 27, 1978, November 8, 1978, and December 21, 1978.

In support of its motion, Plaintiff states as follows:

a. In a pattern of obstruction and delay the Excess Insurer Defendants have sought by various groundless motions to prevent this case from coming to trial on the merits. As the trial approaches they file more motions and engage in more delay, with the result that the time when the Plaintiff obtains recovery of its substantial losses may be unduly postponed.

b. The following chronology is relevant for purposes of this motion:

December 11, 1975—The complaint was filed.

May 10, 1977—Seventeen months later, the Excess Insurer Defendants moved for summary judgment on the grounds of alleged lack of *in personam* jurisdiction and *forum non conveniens.*

July 27, 1978—At a hearing on the summary judgment motion, the Excess Insurer Defendants were ordered to produce within 90 days copies of all insurance policies or cover notes issued by them in or after 1971 in which they provided coverage to insureds located in Pennsylvania, or on risks located in Pennsylvania, or through brokers located in Pennsylvania. These documents, if produced, would have demonstrated that the Excess Insurer Defendants have deliberately engaged in a consistent course of business in Pennsylvania and are therefore subject to the *in personam* jurisdiction of this Court.

October 25, 1978—On this 90th day after July 27, the Excess Insurer Defendants failed to produce any documents. Instead, they filed a "Petition for Extension of Time to Answer Interrogatories," which stated that they had "sought to secure the information necessary to answer plaintiff's interrogatories and will probably be able to complete the answers within thirty days from this date." They have since stated to the Court that the reference to interrogatory answers was in error and should be read to refer to production of documents.

November 8, 1978—The Court granted the motion for an extension of time, giving the Excess Insurer Defendants 30 more days, or until November 25, 1978, to produce the documents.

November 24, 1978—Instead of producing documents, the Excess Insurers' counsel, Mark Bruckman, filed a 2-page affidavit reporting that the Excess Insurers "are unable, without reviewing approximately 4,000,000 files, to determine if the insured risk was derived in some fashion from Pennsylvania." He reported that contact had been made with only 15 of the 21 Excess Insurers during the 4 months following the Court's original order of July 27, 1978.

November 27, 1978—The Plaintiff moved to compel the Excess Insurer Defendants to produce documents in accordance with the Court's orders of July 27 and November 8, 1978.

December 21, 1978—A hearing was held on the Plaintiff's Motion to Compel. At that hearing the Court ordered the Excess Insurer Defendants to produce the documents within 60 more days—on top of the five months which had passed since the original order. The 60 days would expire on February 19, 1979. *The Court made it very clear that if the documents were not produced by the 60th day, it would impose a sanction, and that* *the sanction would be a finding that the Excess Insurer Defendants have done and are doing such business in Pennsylvania as to make them subject to the in personam jurisdiction of the Court.*

December 28, 1978—The Excess Insurers filed a motion to delay proceedings while a question as to their waiver of a defense might be certified to the Third Circuit.

January 22, 1979—The Excess Insurers filed a motion to amend their answer to include the defense they had waived.

January 31, 1979—The Excess Insurers filed a motion challenging the Court's jurisdiction due to an alleged lack of diversity.

January 31, 1979—The Excess Insurers filed a motion to stay proceedings to allow time for the Plaintiff to register in Pennsylvania, an act which is not required under Pennsylvania law.

February 8, 1979—The Court heard arguments on certain of the motions filed by the Excess Insurer Defendants. The Court also established a briefing schedule relating to the Excess Insurers' summary judgment motion. The schedule is predicated upon the production of documents by the Excess Insurer Defendants in accordance with the Court's order of December 21, 1978. The Excess Insurers participated in discussions leading to this scheduling as though they fully intended to produce the documents by February 19, 1979.

February 19 and 20, 1979—The Excess Insurers produced some documents, but not documents which comply with the Court's orders of July 27,

> November 8, and December 21, 1978. Therefore, the sanction described by the Court at the hearing of February 8, 1979 should properly be imposed.

c. The documents produced by the Excess Insurers on February 19 and 20, 1979, clearly do not consist of all of the policies and cover notes written by the Excess Insurers between 1971 and July 2, 1978 in which they provided coverage for insureds located in Pennsylvania, for risks located in Pennsylvania, or through brokers located in Pennsylvania. Those policies or cover notes were the documents which the Court first ordered them on July 27, 1978 to produce within 90 days.

d. Though the Excess Insurers did produce a few policies and cover notes, the vast majority of the documents produced consist of letters from the Excess Insurers to brokers requesting policies and replies by brokers saying they need more time or more information, that they could not comply without examining all of their policies, a task which they do not have staff enough to undertake, or that they simply refuse to comply.

e. Though the Excess Insurers were first ordered to obtain and produce the documents following the hearing on July 27, 1978, it appears from the documents produced that they did not begin to contact brokers who have the relevant documents until January, 1979, one month prior to the final production date. The brokers naturally responded that they could not comply in the time allowed.

f. The Excess Insurers at the last moment threw the entire burden of production upon the brokers, who are not parties to the action. The request form sent by the Excess Insurers to the brokers (a copy of which is attached hereto as Exhibit A) does not offer any staff assistance or financial support to facilitate the gathering of the documents. Nor does it offer any information, such as policy numbers, placing slip numbers, names of insured, or types of coverage, which would have enabled brokers to identify the documents being sought.

g. The request form sent by the Excess Insurers to the brokers is defective in other respects. It asks for policies but does not ask for cover notes. Insurers often provide coverage on the basis of a cover note without executing a policy. The request does not indicate that reinsurance coverage as well as direct insurance is within the scope of the order. The order deals with all of the business done by the Excess Insurers in Pennsylvania, whether direct, reinsurance, or otherwise. The request implies that the Defendants' objective is not to produce documents but to go through sufficient steps ostensibly directed toward gathering documents so that they would be found to have used their "best efforts to comply."

h. The fact that the documents were not produced, in the course of approximately 8 months from July 27, 1978 to February 20, 1979, demonstrates that the Excess Insurers did not use their best efforts. They did not make the initial contact with the brokers who have custody of the documents until 7 months had expired.

i. On July 27, 1978 the Excess Insurers told the Court that they might be able to produce the documents in 90 days. When the 90 days were up, on October 25, 1978, they told the Court that they had "sought to secure" the documents and that they would "probably be able to complete" the production within 30 days. On November 22, 1978 counsel for the Excess Insurers stated in an affidavit filed with the Court that inspection of 4,000,000 files would disclose whether "the insured risk was derived in some fashion from Pennsylvania.. and "the number of insured risks geographically within Pennsylvania." Now, contrary to these representations to the Court, the documents show that the Excess Insurers did not examine their files during the 8 months, did not come close to completing the production within 30 days from October 25, 1978, and in the seventh month turned the burden of file examination and document production over to non-parties.

j. The Excess Insurers furthermore have made representations to this Court which purport to be based upon their examination of their files, stating the percentage of their business and gross premium income which is allocable to Pennsylvania or to the United States or to North America. Presumably, therefore, their files, and the related files of the brokers, would disclose relevant facts regarding their doing business in Pennsylvania. But they have failed to produce the relevant documents from those files, as they were ordered three times to do by this Court.

k. Evidently in the expectation that this Court would impose sanctions for failure to produce documents, and in a further further attempt to delay a trial on the merits, the Excess Insurers have filed a series of groundless motions raising clearly invalid defenses and alleging matters which are clearly untrue, such as that the Plaintiff, whose sole business is the mining of bauxite in Guinea, has a principal place of business in Pennsylvania.

l. At a hearing before this Court on February 8, 1979, counsel for the Excess Insurers participated in discussions concerning the further briefing of their summary judgment motion based upon an alleged lack of in personam jurisdiction. The schedule assumed that they would produce documents on February 19. The parties were given 30 days, until March 19, to file briefs which would, in large part, analyze the documents which were produced. Counsel for the Excess Insurers failed to tell the Court and the Plaintiff that the schedule was meaningless because the documents were not going to be produced on February 19.

WHEREFORE, on the basis of the failure of the Excess Insurers to produce documents as required by repeated orders of this Court, and on the basis of the foregoing facts, plaintiff moves for the entry of an order, the form of which is attached, imposing sanctions against the Excess Insurer Defendants as described above.

CLOYD R. MELLOTT

DALE HERSHEY

ROBERT W. DOTY
Attorneys for Plaintiff

February 23, 1979

Exhibit A to the Motion appears at page , infra.

* * * *

[W.D. Pa. Title not printed]

ANSWER TO PLAINTIFF's MOTION FOR ORDER DUE TO FAILURE TO MAKE DISCOVERY

AND NOW, comes the Excess Insurer Defendants, including all above captioned defendants with the exception of the Insurance Company Of North America, and set forth the following by way of Answer to Plaintiff's Motion for Order due to Failure to Make Discovery:

1. It is denied that the Excess Insurer Defendants have failed to comply with the Court's Orders of July 27,1978, November 8, 1978, and December 21, 1978. It is further denied that the Excess Insurer Defendants have engaged in the activities alleged in plaintiff's Motion or any activities which would effect the previous arguments made by the Excess Insurer Defendants concerning the lack of jurisdiction of this Court.

2. It is denied that the Western District of Pennsylvania is the more convenient forum for which to conduct the trial as between the plaintiff and the Excess Insurer Defendants. Further, it is denied that there is no further issue in this case as to the manner in which the Excess Insurer Defendants conduct their business in London. To the contrary, there are issues of law and fact remaining to be determined with regard to the manner in which the Excess Insurer Defendants conduct their business in London.

3. It is denied that the motions filed by the Excess Insurer Defendants are groundless or filed any motions in an attempt to prevent this case from coming to trial on the merits. To the contrary, the Excess Insurer Defendants believe and aver that the Motions filed by them have merit and that the Court should find in their favor for those motions which have yet to be ruled upon. In addi-

tion, none of the Defendant Excess Insurers' actions in this case have delayed or postponed any of the discovery undertaken by any party in this action and further no action taken by the Excess Insurer Defendants has postponed in any manner the trial of this case on the merits.

4. It is denied that the Excess Insurer Defendants did not begin to contact brokers until January of 1979 as set forth in plaintiff's Motion. To the contrary, brokers were contacted on or before November 24, 1978 at which time an affidavit from Mark Bruckmann, Esquire, was filed with the Court setting forth the enormity of the task involved. Further, at the proceeding before this Honorable Court on July 27, 1978, Attorneys for the Excess Insurer Defendants advised the Court that sixty and even ninety days may not be sufficient to examine and/or produce all the documents required. (N.T. 64, lines 19 through 23 N.T.65, lines 23 through 25).

5. It is denied that the Excess Insurer Defendants waited till the last moment to shift the burden of production of these documents upon the brokers. To the contrary and as stated above, contact with the brokers was made on or before November 24, 1978 at which time counsel for the Excess Insurer Defendants was informed and thereby informed the Court of the enormity of the task involved. The contact in writing with the individual brokers was done in a form to comply with the court's Order requesting information in the three various categories as set forth in the Court's Order. Further, it is denied that the contact, written or oral, with the brokers was defective for not specifying that cover notes were also requested. In fact, the documents produced contained cover notes in compliance with the Court Order.

This clearly shows that the method of doing business in England is different than in the United States.

6. It is denied, as stated in plaintiff's Motion, that the Excess Insurer Defendants have failed to comply with the Court Order and to the contrary it is averred that the documents produced show that the plaintiffs acted in good faith and made every attempt possible to produce all documents requested. In addition, it is denied that the Excess Insurer Defendants have taken any action to delay the trial of this case on the merits. In fact, no action of the Excess Insurer Defendants have delayed the discovery or preparation of this case for trial in any manner.

WHEREFORE, the Excess Insurer Defendants request this Honorable Court to deny plaintiff's Motion for Sanctions in all respect and to hold that the Excess Insurer Defendants have complied with the Court Order with regards to the Motion for Production of Documents.

Weis & Weis
By David L. Beck

[W.D. Pa. Title not printed]

AFFIDAVIT*

COMMONWEALTH OF PENNSYLVANIA } ss:
COUNTY OF ALLEGHENY }

Before me, the undersigned authority, appeared Dale Hershey, Esq., who, after being duly sworn by me, deposed and said that:

1. He is a member of the firm of Eckert, Seamans, Cherin & Mellott, counsel to the plaintiff (hereinafter "CBG") in this action against The Insurance Company of North America and the Excess Insurance Defendants (hereinafter the "EIDs"). He makes this Affidavit in opposition to the summary judgment motion filed by the EIDs and in support of CBG's motion to compel discovery.

2. Attached hereto as Exhibit "A" are true and correct copies of 24 insurance policies and cover notes reflecting coverage written for CBG by EIDs between 1972 and 1977. The policies and cover notes are relevant on three questions now before the Court.

a. Are the EIDs doing business in Pennsylvania?

b. Were the EIDs aware that CBG is a United States corporation when they agreed in 1974 to provide the business interruption coverage on which suit is brought?

c. Do the EIDs, as a common business practice, subject themselves to jurisdiction in the United States when they provide coverage to a United States insured?

*[Second affidavit of Dale Hershey, Esquire]

3. All 24 policies were delivered to CBG in Pittsburgh at the office of Halco (Mining), Inc., which is a part owner of CBG and which acts under contract to procure insurance for CBG. The first 21 of those policies were delivered to CBG by the Pittsburgh Office of Marsh & McLennan. 18 of the policies and cover notes are dated prior to the filing of this action.

4. The EIDs have filed affidavits which state that if they had issued a business interruption policy to CBG, rather than simply initiating placing slips, the policy would not have contained a submission to the jurisdiction of United States courts. The affidavits states that it is common practice to include submission to United States jurisdiction only when the risk being covered is located in the United States. However, the EIDs, in issuing the attached policies and cover notes to CBG covering risks located outside of the United States, commonly agree in those policies to be subject to the jurisdiction of United States courts or to arbitrate policy disputes in the United States.

a. Documents 7, 8, 9, 10, 11, 22 and 24 contain a standard Service of Suit Clause which provides:

SERVICE OF SUIT CLAUSE (U.S.A.)
(Approved by Lloyd's underwriters' Non-marine Association)

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured) will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such courts jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon

Mendes and Mount, 27 William St., New York 10005
USA , and

that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the insured (or reinsured) to give a written undertaking to the insured (or reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes pravision therefore, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their free and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured (or reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

22/5/52

N.M.A.772.

b. Documents 14, 15, 16, 17, 18 and 19 adopt the standard Lloyds policy which includes the following as Clause 11:

11. SERVICE OF SUIT CLAUSE (U.S.A.)

It is agreed that in the event of the failure of the Underwriters to pay any amount claimed to be due hereunder, the Underwriters at the request of the Assured will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon the person or persons specified for the purpose in the Schedule and that in any suit instituted against any one of them upon this contract, the Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above mentioned person(s) are authorized and directed to accept service of process on behalf of Underwriters in any such suits and/or upon the request of the Assured to give a written undertaking to the Assured that he/they will enter a general appearance upon Underwriters' behalf in the event such suit be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, the Underwriters hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit on proceeding instituted by or on behalf of the Assured or any beneficiary hereunder arising out of this contract of insurance and hereby designate the above mentioned person(s) as the person(s) to whom the said officer is authorized to mail such process or a true copy thereof.

c. Document 12 contained a clause in which the Insurer submits to arbitration in the United States.

DALE HERSHEY

[Jurat not printed]

INDEX OF ATTACHED POLICIES AND COVER NOTES

I. Coverage Related to the Boke Project Underwritten by Excess Insurer Defendants through the Pittsburgh Office of Marsh & McLennan.

A. *Business Interruption Coverage*

1. Cover Note 4093011, dated April 10, 1974 (All 21 EIDs* were underwriters.)
2. Addendum to Cover Note 4093011, dated April 4, 1975 (The Insurance Corporation of Ireland, Ltd. and 14 other EIDs were underwriters.)
3. Cover Note 4093012, dated April 4, 1975 (The Insurance Corporation of Ireland, Ltd. and 6 other EIDs were underwriters.)

---

* Excess Insurer Defendants are referred to herein as "EIDs." The Complaint names 22 companies as EIDs. Because Defendant Insurance Corporation of Ireland, Ltd. assumed the portion of the risk underwritten by Defendant Mercantile & General Reinsurance Co., Ltd., the latter company was removed from the case by the Order dated October 26, 1976, leaving 21 EIDs

4. Cover Note 5093011, dated July 16, 1975 (The Insurance Corporation of Ireland, Ltd. and 14 other EIDs were underwriters.)

5. Cover Note 5093012, dated July 16, 1975 (The Insurance Corporation of Ireland, Ltd. and 6 other EIDs were underwriters.)

6. Cover Note 5706021, dated June 30, 1975 (The Insurance Corporation of Ireland, Ltd., English and American Insurance Co., Ltd., British Reserve Insurance Co., Ltd., and Consolidated European Reinsurance Co., Ltd. were underwriters.)

B. *Aircraft Loss or Damage Coverage*

7. Policy 73 ZW 1084, dated December 10, 1973 (The Insurance Corporation of Ireland, Ltd. was an underwriter.) [appears at p. ___ infra]

8. Policy 74 ZW 1084, dated January 7, 1975 (The Insurance Corporation of Ireland, Ltd. was an underwriter.)

9. Cover Note 75 ZW 1084, dated November 4, 1979 (The Insurance Corporation of Ireland, Ltd. was an underwriter)

10. Policy 76 ZW 1084, dated December 9, 1976 (The Insurance Corporation of Ireland, Ltd. was an underwriter.)

11. Policy 77 ZW 1084, dated December 7, 1977 (The Insurance Corporation of Ireland, Ltd. was an underwriter.)

C. *Aircraft Liability Coverage*

12. Policy 74 ZW 1085, dated January 6, 1975 (The Insurance Corporation of Ireland, Ltd. was an underwriter.)

13. Policy 77 ZW 1085, dated November 25, 1977 (The Insurance Corporation of Ireland, Ltd. was an underwriter.)

D. *Aircraft Excess Liability Coverage*

14. Policy 72 ZW 938, dated November 21, 1972 and renewed January 5, 1973 (The Insurance Corporation of Ireland, Ltd., Eagle Star Insurance Co., Ltd., and Excess Insurance Co. Ltd. were underwriters.)

15. Policy 73 ZW 1086, dated November 30, 1973 (The Insurance Corporation of Ireland, Ltd., Eagle Star Insurance Co., Ltd., and Excess Insurance Co. Ltd. were underwriters.)

16. Policy 74 ZW 1086, dated January 6, 1975 (The Insurance Corporation of Ireland, Ltd., Excess Insurance Co., Ltd., Trident Insurance Co. Ltd., and Turegum Insurance Co. were underwriters.)

17. Cover Note 75 ZW 1086, dated November 4, 1975 and renewed February 10, 1976 (The Insurance Corporation of Ireland, Ltd., Excess Insurance Co. Ltd., Trident Insurance Co., Ltd. and Turegum Insurance Co. were underwriters.)

18. Policy 76 ZW 1086, dated December 10, 1976 (The Insurance Corporation of Ireland, Ltd. and Excess Insurance Co. Ltd. were underwriters.)

19. Policy 77 ZW 1086, undated, providing coverage from October 23, 1977 to October 23, 1978 (The Insurance Corporation of Ireland, Ltd., British Reserve Insurance Co., Ltd., Excess Insurance Co., Ltd., Trident General Insurance Co., Ltd., and Turegum Insurance Co. were underwriters.)

E. Property Damage Coverage

20. Cover Note 3086851, dated ______________. (Eagle Star Insurance Co. Ltd. and British Reserve Insurance Co., Ltd. were underwriters.)
21. Cover Note 4086851, dated April 25, 1974 (Eagle Star Insurance Co., Ltd., Slater, Walker Insurance Co, Ltd., British Reserve Insurance Co., Ltd. and Stronghold Insurance Co., Ltd. were underwriters.)

II. Other Coverage Related to the Boke Project Underwritten by Excess Insurer Defendants.

A. Wreck Removal Coverage

22. Policy MH 1477200B, effective January 25, 1974 (English & American Insurance Co., Ltd. was an underwriter.)
23. Cover Note 40156B, effective January 25, 1975 (English & American Insurance Co., Ltd. was an underwriter.)
24. Policy MH 2037600B, effective January 25, 1977 (English & American Insurance Co., Ltd. was an underwriter.)

* * * *

[W.D. Pa. Title not printed]

MOTION FOR INJUNCTION

Plaintiff COMPAGNIE DES BAUXITES DE GUINEE ("CBG") moves this Court for an injunction order directed against the Excess Insurer Defendants (being all of the defendants except Defendant Insurance Company of North America) compelling them to discontinue forthwith the prosecution of a suit which they have purported to institute against CBG in the High Court of Justice, Queen's Bench Division, Royal Courts of Justice, at 1979-I-No. 1727, London, England, and to refrain and desist from filing any other actions or suits against CBG in any court relating to the subject matter of the suit which is presently before this Court. CBG further asks this Court for an order requiring the Excess Insurer Defendants to fully reimburse CBG for its costs, including attorney's fees, incurred in the prosecution of this present motion and incurred in responding to the duplicative action filed in England by the Excess Insurers.

In support of this motion, CBG states as follows:

1. On March 22, 1979 the Excess Insurer Defendants purported to institute suit against CBG in London, England. According to the statement of their claim, they seek to void the insurance contract on which CBG bases the action against them which it has brought before this Court. Copies of the affidavit of the Excess Insurer Defendants' solicitor and the writ containing the statement of claim are attached hereto as Exhibit A. (Exhibits to the solicitor's affidavit are omitted).

2. Counsel for CBG in the action before this Court did not learn of the purported commencement of suit in London until April 10, 1979. Information that suit was filed in London was conveyed to CBG counsel informally.

Counsel for the Excess Insurers had delivered suit papers to CBG's registered office, c/o Prentice-Hall, in Dover, Delaware on March 30, 1979, but failed to notify CBG's counsel. As of the date of this motion, CBG has not received any suit papers from Prentice-Hall. The attached papers were obtained from counsel for the defendants in this action after the existence of the London suit was informally mentioned on April 10, 1979.

3. The filing of the action in London represents one more attempt by the Excess Insurers to delay and obstruct proceedings before this Court and to subvert the jurisdiction of this Court. The suit in London is concerned with the same insurance contract which is before this Court; the suit raises defenses which should have been raised before this Court if they had any validity; and the suit in London involves the same parties as those in Count II of the action before this Court. By filing a duplicative and parallel action in London, the Excess Insurer Defendants have obviously attempted to bring about a change of forum, even though this Court has not yet ruled on their forum non conveniens motion.

4. Rather than to permit this case to be tried on the merits, the Excess Insurer Defendants have filed a series of groundless and self-contradicting motions and appeals. Their bad faith is highlighted by the fact that their solicitor's affidavit filed in London states that CBG "does not carry on business in the United States, but only in Guinea," while their American counsel represent in motions filed in this Court that CBG's principal place of business is in Pennsylvania. See Solicitor's Affidavit, Exhibit A hereto, 6. Counsel for the Excess Insurers have even asked this Court to hold a lengthy hearing at which they will attempt to demonstrate that CBG's principal place of business is in Pennsylvania.

5. CBG does not admit or acknowledge that the suit which the Excess Insurers have purported to file in London states a cause of action, that CBG is subject to the jurisdiction of the English court, that papers connected with the action in London have been properly filed and served, or that CBG has any obligation to respond to any papers which it may receive in connection with that suit.

6. This motion seeks to preserve the jurisdiction of this Court, to avoid duplicative litigation, to terminate the harassment and delay in which the Excess Insurers have engaged, and to make possible the early trial of this case on the merits.

WHEREFORE, CBG asks this Court for an injunction against the Excess Insurers compelling them to discontinue the prosecution of the suit which they have purported to commence in London and any other suits dealing with the same subject matter as that before this Court. CBG asks further that service of the Court's order granting the injunction be deemed to be effective upon delivery of a copy of the injunction to the Pittsburgh counsel of the Excess Insurer Defendants. CBG finally asks this Court for an order denying the summary judgment motion filed by the Excess Insurers and imposing sanctions upon them, these issues having already been fully briefed.

CLOYD R. MELLOTT
DALE HERSHEY
ROBERT W. DOTY

ECKERT, SEAMANS,
CHERIN & MELLOTT
Attorneys for Plaintiff

April 12, 1979

* * * *

[W.D. Pa. Title not printed]

PROCEEDINGS

on Plaintiff's Motion For Preliminary Injunction in the above entitled action, April 18, 19, 1979, at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons.

* * * *

[2] (April 18, 10:08 o'clock a.m.)

(In Open Court)

THE COURT: Mr. Mellott.

MR. MELLOTT: Good morning, your Honor.

Your Honor, this is the time fixed for a hearing on the Plaintiff's motion for an injunction to enjoin any further prosecution by the Excess Insurer Defendants (and they are all of the Defendants in this action other than the Insurance Company of North America) of the suit filed by them in the High Court of Justice, Queen's Bench Division, at Number 1979-I-#1727, and to enjoin them, their agents, officers, employees and attorneys, from prosecuting any other action involving the contract which has been before this Court for determination since December of 1975; over three years ago.

Your Honor, I would like to mark as Plaintiff's Exhibit Number 1, in connection with this hearing, the papers which were provided to us by counsel for the Defendant on Wednesday of last week following our request. We still have not received copies of papers that were purportedly served by counsel in this case—of record in this case—for the Excess Insurer Defendants on the statutory agent of the Plantiff in Dover, Delaware. Even though counsel in this case served those papers on our statutory agent on March 30th, they did not have the courtesy to provide us with a copy until we asked for a copy last Tuesday when we found out at a deposition, rather informally, [3] that the suit had been filed, your Honor.

THE COURT: Any objection to this Exhibit?

Okay, hearing no objection, Plaintiff's Exhibit 1 for this hearing is admitted and made a part of the record. Is it a copy of the complaint that was filed in England?

MR. MELLOTT: It's a copy of all of the papers, your Honor, including affidavits and attachments, as I understand it. But I have not actually seen the papers that were served, nor have I seen the papers in England as of this date. These are copies of the papers that were delivered to us last Wednesday.

I would also like to ask Mr. Bruckmann whether he will acknowledge to the Court that an attorney from his office served the papers on Prentice-Hall in Dover, Delaware on March 30th, 1979?

MR. BRUCKMANN: Yes, that's quite accurate, your Honor.

MR. MELLOTT: And no copy was forwarded to my office, isn't that correct?

MR. BRUCKMANN: Well, we received a call from CBS's general counsel that they got the papers: Curtis Mallett-Prevost.

MR. MELLOTT: When did you receive that call?

[4] MR. BRUCKMANN: Yesterday. Apparently it was a procedural foul-up; they sent the papers to France.

MR. MELLOTT: But, you made no effort to send a copy to me in this case, did you?

MR. BRUCKMANN: I'm surprised you didn't get them right away from your statutory agent. We gave them to you informally. I think it was courteous enough.

* * * *

[5] MR. MELLOTT: All right, your Honor.

Your Honor, of course, I would sssume and offer in evidence for purposes of this hearing the various pleadings, Complaint, Answers, Amended Answers and motions which —well, the motions which have been filed by the Plaintiff. I will also offer in evidence all of the affidavits which we have filed with this Court.

Now, the Answers and Amended Answers of the Insurance Company of North America and the Excess Insurer Defendants, I also offer in evidence, your Honor, for purposes of this hearing.

THE COURT: Okay. They're all admitted and made a part of the record.

* * * *

[7] Now, you Honor, we have also submitted a brief to you today summarizing the position which we had previously briefed on the in personam jurisdiction position which has been asserted by the Excess Insurer Defendants. As you Honor is aware, they, several months after the Complaint was originally filed—I think in May of '77; the Complaint was filed [8] in December of '75—the Excess Insurer Defendants filed a motion for summary judgment, on which they alleged that they were not doing business in this jurisdiction and were not subject to suit in this jurisdiction.

Now, when I say the Excess Insurer Defendants filed that motion, let me be a little more specific. 17 of the 21 joined in the motion that there was no in personam jurisdiction over them in this court; the other 4 acknowledged that there was jurisdiction. But the other 4 joined in the second portion of the motion for summary judgment, which was a forum non conveniens argument: that the case should be dismissed on the ground that this was not a convenient forum for them.

We have briefed that matter in detail. We have summarized it in a brief which we filed today, your Honor, and I would like to just go through the points in that brief, briefly with your Honor, if I may. I might also recall to the Court, as I'm sure you remember, that on July 27 of last year, 1978, we had an argument before this Court on this motion for summary judgment, at which time the attorneys for the Excess Insurer Defendants acknowledged that the Excess Insurer Defendants derived about one per cent of their income from the State of Pennsylvania.

THE COURT: That's each one of them?

MR. MELLOTT: Your Honor, they were willing to stipulate, and indicated, that one per cent of the [9] income of the Excess Insurer Defendants was derived from the Commonwealth of Pennsylvania. And I can refer your Honor to the specific language on that in just a minute. It's in the transcript of the hearing of July 27th, your Honor. I thought I had the page number here. If you will give me just a minute. I'll just check one of my other papers. Well, on page 2 of their brief. I'm reading from page 2 of the brief filed by the Excess Insurer Defendants with this Court entitled, "Further Memorandum of Law In Support Of Motion to Dismiss." And it was received by us on March 19, 19 —I guess this was on March 19, 1979. "In November of 1978—" I'm quoting from the brief—"the Excess Insurers submitted an affidavit stating that the information requested would require a review of over four million files, and at a December 21, 1978 status conference the Excess Insurers were willing to stipulate that that they derive one per cent of their premium income from Pennsylvania in order to satisfy CBG's concern with the extent of Pennsylvania business." That's at the December 21, 1978 conference.

Your Honor, I offer in evidence the portion of the brief which I have just read.

THE COURT: Any objection? Hearing no objection -

MR. BRUCKMANN: No, your Honor.

THE COURT: Pardon me. Did he say no? All right, hearing no objection, the page 2 of the Excess [10] Insurer's brief filed March 19, 1979 is admitted and made a part of the record.

MR. MELLOTT: Thank you, your Honor.

THE COURT: The Court will consider that as an admission.

MR. MELLOTT: Yes, your Honor. I offer it as such. Well, I think that is sufficient for that point, your Honor. The reference to the transcript is also made there for the supporting back up.

THE COURT: Well, do you want that transcript of July 27th in or not?

MR. MELLOTT: Well, I would like to offer in evidence as well, your Honor, pages 15 and 16 of the transcript of the hearing on December 21, 1978.

THE COURT: Any objection?

MR. BRUCKMANN: As to what?

MR. WEIS: As to what?

THE COURT: As to the admission of pages 15 and 16 of the transcript of July 27th, 1978.

MR. MELLOTT: No. It's December 21, 1978, your Honor. I'm sorry.

MR. WEIS: That was merely meant to be a proposal. That wasn't meant to be an admission, or to be construed as such. We would object to that.

THE COURT: Read it and see what it [11] says there, then we'll consider it. Was this December 21, 1978?

MR. MELLOTT: Yes, your Honor.

THE COURT: I thought you mentioned July 27.

MR. MELLOTT: Yes, your Honor. I misstated that. That was when we had the original argument.

THE COURT: All right.

MR. MELLOTT: I'll get the part I want to refer to here, your Honor. There is a prior part of this that I'll have to—I'm reading from Mr. Bruckmann's statement: "Perhaps, the easiest thing to do is if we agree that some of these Defendants write one per cent of their premium income, which we have already stated. Why do you need the policy? We already have the volume that we have told you how much they write."

Then, there is a prior—that's on pages 15 and 16, your Honor. That's the part I was offering in evidence.

On pages 11 and 12. "Mr. Bruckmann," starting at the bottom of page 11, "Yes, your Honor, the Vesta Insurance Company, and the second is the Chiyoda Insurance Company. The remaining Defendants have all stated that the percentage of business coming from Pennsylvania for risks physically within Pennsylvania, or for assureds in Pennsylvania, is less than one per cent of their premium income through their London office."

"'THE COURT: So, what you are saying [12] is that 17 of them do do business in Pennsylvania?"

"MR. BRUCKMANN: They have in the past insured risks in Pennsylvania, and we contest that that is not sufficient predicate for the exercise of in personam jurisdiction."

I, also, offer in evidence that portion of the colloquy at pages 11 and 12 of the December 21, 1978 transcript, your Honor.

THE COURT: Any objection?

MR. WEIS: Yes, your Honor. I object to it as being any sort of an admission at all because in there we say less than one per cent. It could be nothing that they wrote here in Pennsylvania.

THE COURT: I think it's clear that they admit they did some business in Pennsylvania. It's not clear as to the exact percentage of the one per cent, but it's clear they admitted they did business in Pennsylvania'

MR. MELLOTT: That's right, your Honor. And it was because of this that we requested them, at the July 27th hearing, to produce the policies, which they agreed to produce and your Honor ordered they produce, which would show the extent of the business that they had engaged in.

Then, at the December 21, 1978 hearing, when it became apparent that they hadn't done anything except make some calls in that whole period from July to December—they made some contact with 15 insurers, excess insurers, not even [13] all of them, and produced nothing—

THE COURT: All right. The Court is going to admit pages 11, 12, 15 and 16 of the transcript of December 21st, 1978.

NOW, there was one company there that you mentioned that they excluded, I think?

MR. MELLOTT: Well—

THE COURT: Chiyoda was it?

MR. MELLOTT: (continuing) —there were two companies mentioned in that particular part, your Honor.

THE COURT: Well, who were those companies?

MR. MELLOTT: Well, those are two of the Excess Insurers, and we submit that—

THE COURT: Chiyoda from Tokyo. Were they made a part of this or not?

MR. MELLOTT: Yes, your Honor, we believe they are in the case as well.

THE COURT: But they did exempt them from this, the -

MR. MELLOTT: Well, this particular stipulation and admission, your Honor, doesn't cover them, perhaps, but —

THE COURT: That's what I have in mind. [14] All right.

MR. MELLOTT: (continuing) —but it covers everybody else, and we believe —

THE COURT: Except Chiyoda?

MR. MELLOTT: Well, there are two of them, your Honor. The other one is —let's see here. Vesta is the other one.

THE COURT: Now, do you have any other evidence that would link Vesta and Chiyoda?

MR. MELLOTT: Well, your Honor, as far as all of these companies are concerned, they were ordered by your Honor in July to produce all of the policies reflecting contact with Pennsylvania, where they either insured a risk in Pennsylvania or issued to an insured in Pennsylvania or through a broker in Pennsylvania.

At the December —let me get the papers here in front of me, your Honor. At the December 21 hearing, when it became apparent to your Honor, after a full review of this with Mr. Bruckmann, that the Defendants, the Excess Insurer Defendants, had not done anything, really, within that period of time —

THE COURT: To do what?

MR. MELLOTT: To produce these documents to show—you know, they raise the question of the quantitative nature of the business that they're doing in Pennsylvania, and [15] then they won't produce the documents for us to test that position. They still haven't produced them, your Honor. And even though all of those months went by from July into December they did nothing.

Your Honor went through all of this with them in December, and your Honor was satisfied at that time and commented on the record that it was obvious they had done little in the intervening period to try to comply with your Honor's order and what they had promised to do.

Consequently, your Honor ordered on page—well, your Honor said, at one point, "Well, if that is your whole argument, then you're going to have to get what I told you to get because it's a quantitative defense that you're raising here."

Mr. Bruckmann had said prior to that—I'm reading from page 22 of the transcript of the December 21, 1978 hearing, your Honor—"We know the percentage was very small. We submit that is not sufficient. Predicated on the Constitutional Due Process requirements, it is not sufficient. That is our whole argument, your Honor. And there are some companies that write no United States business." Presumably, referring to the two that we have just referred to previously.

AND your Honor then said, "Well, if that is your whole argument, then you're going to have to get what I told you to get because it's a quantitative defense that [16] your're raising here." Your Honor went on to say, "All right, I will tell you what I am going to do." I'm now referring to page 23. "I am going to give you 60 days to get this information to Mr. Mellott as you have promised. See, you promised to go ahead and do this. And if you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume under Rule Of Civil Procedure 37(b), sub-section (2)(A) that there is jurisdiction. That's what I'm going to do."

Your Honor—

THE COURT: Well, have they produced this information?

MR. MELLOTT: No, they have not, your Honor.

THE COURT: Is that true, Mr. Bruckmann?

MR. BRUCKMANN: Your Honor, in the original July 27 hearing, you stated that we could try and get this information by directing form letters to brokers. And after the December hearing, our client did direct those form letters to the brokers and the responses back have been produced to this court. They do include some policies; they do include some cover notes and some placing slips.

THE COURT: Does this satisfy the terms of what we said on December 21st in order to establish quantitatively what the extent of your business is? Can a reasonable [17] person draw from what you have supplied so far as to what percentage of business your companies are doing here in the United States particularly Pennsylvania?

MR. BRUCKMANN: In some of the documents produced, yes, your Honor. We also procuded Schedule T's for the companies which are licensed in Pennsylvania and they give a quantitative definition as to these as to the per cent of business.

MR. MELLOTT: If the Court please—Excuse me. I didn't mean to interrupt you, Mr. Bruckmann.

MR. BRUCKMANN: (continuing)—The remaining letters from brokers indicate great difficulty in determining the information and a refusal to get it because of time and money and other considerations on behalf of the brokers.

MR. MELLOTT: If the Court please. What Mr. Bruckmann has told you—even if I agreed it was accurate, and I don't—but he said your Honor agreed at the July 27th hearing, 1978, that all they had to do was write to the brokers. That is not correct, your Honor. They were ordered, and as your Honor noted at the December hearing they promised to produce, the contracts relating to this business with these three items in Pennsylvania: either insureds in Pennsylvania; either written through brokers in Pennsylvania; or covering a risk in Pennsylvania.

[18] Your Honor, even if what he said was right, they didn't do a thing about writing a letter to a broker from July 27th, 1978 until the middle of January, 1979, after your Honor told them in December of '78 that they'd either produce these policies or you were going to issue sanctions under Rule 37(b).

THE COURT: Well, have they produced enough at this point?

MR. MELLOTT: They have not, your Honor. They have produced almost nothing. And in that regard, your Honor, I would offer in evidence, to show what they produced, letters which they have written to your Honor and the enclosures which they sent with them.

One letter is dated March 20th, 1979 from Weis & Weis to your Honor at this number; another letter is dated March 22, 1979 to your Honor with some additional documents. And I believe there is a third letter, that I don't have the date of right now—

MR. HERSHEY: There is a third letter, your Honor, dated, I believe, February 20, 1979, and it is very similar in its text to the letter dated March 20th, 1979. It's a letter from Weis & Weis to your Honor—it's a cover letter with which they provided the Court with copies of the documents they were producing for us.

MR. MELLOTT: Your Honor, most of what [19] was produced, as you will see from looking at those documents which I have now offered in evidence, are form letters which were written to thousands of brokers and responses from the brokers. Many of the brokers responded by saying that they were unable to do it.

Your Honor, it's significant that even though this matter was considered in detail by your Honor at the December hearing—and I would suggest that your Honor review that transcript because this whole matter was gone into in detail at that time by your Honor. And yet, they didn't even write a letter to the broker until around almost a month later (the middle of January). And they gave the brokers no policy numbers, no assistance, no reference. They wrote letters like this: "On the advice of our American attorneys in connection with certain proceedings in Pennsylvania, it is necessary for us to respond within 60 days from the 21st of December, 1978 to a ruling of the Pennsylvania court that we produce copies of all policies A) for assureds in Pennsylvania; for risks located in Pennsylvania; or which were issued through brokers located in Pennsylvania. If we do not use our best efforts to comply with this order, we face being penalized by the Pennsylvania court, and it is, therefore, necessary to ask for your assistance."

They gave them no information on insureds, policy numbers, or anything else. Nor did they provide them any financial assistance or any personnel assistance.

[20] I submit, your Honor, that this is not an act of good faith by these Excess Insurer Defendants to start in January to simply write letters to brokers when they were ordered to produce it back in July of 1978. Therefore, your Honor, as far as we're concerned, we submit that the sanctions should be imposed in accordance with what your Honor —

* * * *

[29] MR. MELLOTT: Well, that's the only concern I had. and your Honor still hasn't ruled on my offer of the letters which they submitted to your Honor, that is, the Excess Insurer Defendants, as well as the documents which they enclosed with them. I would again offer those documents in evidence.

THE COURT: We'll allow them to be admitted as evidence, but the problem is what weight—I mean, it's not up to me. I'm not proving the case. You are the person who would know whether they were relevant, to show your position.

MR. MELLOTT: Well, your Honor, what [30] they show is, I submit, your Honor, from a review of them—those documents—will demonstrate that they have not produced the documents which they were ordered to produce. And, in effect, they acknowledge that in their briefs filed in connection, or in opposition to our motion for sanctions.

* * * *

[31] MR. MELLOTT:

* * * *

[32] The only two Defendants, Excess Insurer Defendants (Hanover and Eagle Star) who provided any information as to the measure of business done in Pennsylvania in the documents which were produced for us (only two of them have shown that) Hanover collected $4,188,528 in direct premium income in one year alone in 1975, the year in which CBG filed suit.

THE COURT: You mean from Pennsylvania business?

MR. MELLOTT: Yes. They've admitted that, your Honor, in these documents and the records which I have offered.

THE COURT: But none of the other companies would admit any dollar amounts?

MR. MELLOTT: None of the other companies have produced sufficient documents to show that, your Honor.

That's why I say that the sanctions deserve to be imposed.

* * * *

[34] THE COURT: Now, is that the stack of documents that they produced (indicating)?

MR. MELLOTT: That's the documents they produced, your Honor, I assume. Excuse me a second. Well, your Honor, as I understand it, you have received in evidence those documents. I do not know that those are all of the ones that were produced, but many of these documents are not insurance contracts or cover notes or policies, or anything else, they're letters. And some of them are letters such as this: A letter written by one of the brokers to Trident General, one of the Excess Insurers. "We refer to your letter of the 25th of January." That's over a month, your Honor, after you had told them in December that they should either produce within 60 days or else you were going to enter the sanctions. They let over half that 60 days go by before they even ever write a letter. Now, some of the letters were written prior to that. Some of them were written as early as January 8, I believe, But they still delay. The broker says, "We have received similar letters from at least 10 other companies, and we performed a preliminary examination of the problems to ascertain whether or not it was possible to secure the information that was desired by each and every company." And they say, "We come to the conclusion that with the best will in the world the task that was being asked of us was impossible to achieve as it covered a six-year [35] span and would entail an enormous amount of clerical effort for a lengthy period of time to stand any chance of isolating any Pennsylvania risks." They go on to say, "We regret, therefore, that we are not in a position to provide you with the information you require unless you are in a position to identify to us the names of particular risks that are involved." And then they go on to say, "Even if you could provide that information, it is still highly questionable whether we would be able to complete the task in the remaining period of time to enable you to have the response to the Pennsylvania court by the 21st of February."

* * * *

[36] MR. MELLOTT: But on the point now of the fact that there is jurisdiction here, at the — independent of the application of sanctions — at the hearing on February 8th, 1979, counsel for the Excess Insurer Defendants told this court, and I quote at page 9, "They—" referring to the Plaintiff—"are suing on an insurance contract which was placed wholly within Pennsylvania." That's not my language, your Honor, that is the language of the Excess Insurer Defendants' counsel to this court. They also told the Court at that same time—again at this same hearing on February 8th, 1979, at page 62—counsel for the Excess Insurers told this court, "The insurance which is—" and I'm quoting, your Honor, from page 62—"The insurance, which is the subject of the law suit, was procured in Pennsylvania."

Now, your Honor, I offer in evidence those two statements that I have read, just read, from pages 9 and 62 of the transcript of the hearing before this Court on February 8th, 1979.

THE COURT: Any objection?

MR. WEIS: I'd object to them, your Honor.

THE COURT: On what ground?

MR. WEIS: I don't know what ground they are being offered into evidence for. He just said he offered them.

[37] THE COURT: He wants to know what the relevancy of these statements is.

MR. MELLOTT: Well, your Honor, if the Excess Insurers issue insurance contracts in Pennsylvania and derive pecuniary benefit from Pennsylvania, they are subject to the long-arm statute of Pennsylvania and subject to the jurisdiction of this Court.

THE COURT: And you are saying that is an admission of the attorneys to that effect.

MR. MELLOTT: That's right, your Honor.

MR. WEIS: I object to it, your Honor. I don't think it's any admission to anything. The first quote he said, as I understand it was, the contract was placed in Pennsylvania, period, and nothing more, just that isolated statement. It could well be that whoever said that was referring to the INA policy. Because, as I understand from the depositions, and so forth, the INA policy was placed here. That's certainly not —

THE COURT: Well, which attorney made the statement? Was he representing the Excess Insurers?

MR. MELLOTT: It was the attorney representing the Excess Insurers. It was —

THE COURT: What was his name?

MR. MELLOTT: Well, it was the young lady. Miss D'Mato. She made both of those statements.

[38] THE COURT: She is the one who made these statements?

MR. MELLOTT: Yes, your Honor.

THE COURT: They would be admissions all right, if she said this.

MR. MELLOTT: She said that, your Honor, and it's very clear what she is talking about.

THE COURT: Your objection will be overruled on that.

MR. MELLOTT: Your Honor, in this particular case, no policy of insurance, as such, was ever issued except by Insurance Company of North America. The only thing that the Excess Insurers did was issue a cover note.

THE COURT: Were they issued in Pennsylvania, these cover notes?

MR. MELLOTT: It was delivered in Pennsylvania by Marsh & McLennan to the Plaintiff—well, to Halco Mining, one of the shareholders of CBG, and they were paid for that cover note in Pittsburgh. That's been admitted by the Excess Insurer Defendants. And a copy of the cover note, your Honor —

THE COURT: Well, I see heads moving back there as though that's not true. Do you have something to substantiate your last statement, Mr. Mellott?

MR. MELLOTT: Yes, your Honor, including their —

[39] THE COURT: I think you have got to put it on the record.

MR. MELLOTT: Okay. Well, your Honor, let me just get the July 27th hearing. If you will give me just a minute to locate the page from the record. Okay. Well, I might point out, first of all, your Honor, that in the Beadling Affidavit, which has been introduced in evidence today, there is a copy attached to it of a letter from Mr. Beadling —

THE COURT: Who is Mr. Beadling?

MR. MELLOTT: Mr. Beadling is one of the agents at Marsh & McLennan's office, your Honor. It's a letter dated June 11, 1974 on Marsh & McLennan's stationery.

THE COURT: What is the date on that again?

MR. MELLOTT: June 11, 1974. And this letter is the cover letter, and is identified as such in the Affidavit, which reads as follows: "We're pleased to enclose Insurance Company of North America Business Interruption Policy 71HF1195 written for the period February 12, 1974 to June 1, 1974, in the amount of 10 million dollars subject to a deductible of seven working days on all occurrences except losses arising out of the wharf area where the deductible is 28 working days." Then there is another paragraph that's not pertinent for the point that we're making here. And the next to the last paragraph: "We are also enclosing excess business interruption coverage [40] written with Lloyd's Of London in the amount of 10 million, excess of 10 million, effective February 12, 1974 for a period of one year. This policy follows the terms and conditions of the Insurance Company of North America's policy."

Now, what they forwarded, as is identified from the Affidavit, is the cover note. Now, in addition, your Honor, at the hearing on July 27, 1978, the —

THE COURT: Where is Mr. Beadling's statement? Where is that located now?

MR. MELLOTT: In his affidavit, —

THE COURT: In his affidavit. All right.

MR. MELLOTT: (continuing) —which we filed with your Honor and which I offered in evidence. It was one of the affidavits that I offered earlier today. It's the affidavit of Milton Beadling.

THE COURT: It was filed with the Court when?

MR. HERSHEY: April 7, 1978.

* * * *

[43] MR. MELLOTT: Let me read to you from Mr. Beadling's affidavit. This is an affidavit of Milton G. Beadling filed with this Court, in evidence before this Court, copies of which have been served over a year ago on Mr. Bruckmann.

Paragraph 6: "Marsh & McLennan in Pittsburgh acted as agent for INA and the Excess Insurers for purposes of delivering the policy and cover note to the insured and for purposes of collecting the premium from the insured.

With a letter dated June 11, 1974—"that is the letter I referred to previously—" a copy of which is attached hereto as Exhibit A, I transmitted to David Ware, representatives of CBG, at 2 Allegheny Center, Pittsburgh, Pennsylvania, the INA policy and the cover note evidencing the placement of coverage with the Excess Insurers. With the same letter, I transmitted invoices, copies of which are attached in Exhibit A, for payment of the premiums due to the insurers. The premiums were duly paid to Marsh & McLennan and were then transmitted to INA and to Bland Welch for distribution to the Excess Insurers."

* * * *

[50] MR. MELLOTT: All right, let's find out what Mr. Olyslager says about that. Mr. Olyslager is the officer of INA Reinsurance with whom Bland Welch negotiated the reinsurance at the same time they were negotiating for the excess insurance coverage. What does he say about the effect of a cover note? He, really, substantively

has the largest precentage of this excess insurance; approximately 4 million of the total 10.

* * * *

[51] MR. MELLOTT: Now, your Honor, they can't have one fact here and one fact there, whatever suits them, in a particular proceeding. The facts are the facts. Now, just on this last point, on transcript page 13 of the July 27th hearing —

THE COURT: Which year is this?

MR. MELLOTT: 1978, your Honor.

THE COURT: All right.

[52] MR. MELLOTT: And I offer in evidence what I am reading.

THE COURT: July 27th?

MR. MELLOTT?: Yes. This is Miss D'Amato again, telling this court—and I'm quoting—"In this case, it merely stated that the provisions of the excess policy which eventually would be issued would follow the wording of the primary policy, but essentially the character of the cover note, as is stated in our brief and in our affidavits, is a memorandum prepared for the insured. It has no binding effect. The terms of the cover note do not bind the insurers. The insurers are bound by what they agreed to upon initialing the placement."

Now, of course, that does two things. First of all, she acknowledges there, your Honor, very significantly, that the policy would follow the wording of the primary policy. And the primary policy is the INA policy which, clearly, is governed by the law of Pennsylvania.

But secondly, she says, "The cover note has no binding effect." There is no qualification on that.

And I offer what I have just read in evidence as an admission by the Defendants, the Excess Insurer Defendants.

THE COURT: Any objection? Hearing no objection, page 13 of the transcript of July 27, 1978 is admitted [53] and made a part of the record.

MR. MELLOTT: Now, your Honor, Mr. Olyslager, portions of whose deposition I would like to offer in evidence at this time. Pages 1 —

THE COURT: What date is this?

MR. MELLOTT: This is Mr. Olyslager's deposition — and that's O-l-y-s-l-a-g-e-r — taken in Brussels on February 28, 1978, attended by counsel for all Defendants. I offer in evidence pages 1 through 9; pages 12 and 13; page 21 through —

THE COURT: Are you going to read these into the record?

MR. MELLOTT: I'm going to read some parts of them.

THE COURT: All right.

MR. MELLOTT: (continuing) —through 38.

THE COURT: 21 through 38?

MR. MELLOTT: Yes, your Honor, inclusive.

Now, your Honor, on this question, Mr. Olyslager testified that he had world-wide experience in the insurance business and a lot of what I offered in evidence from his deposition initially shows what that experience was.

It was he who had the contacts with Bland Welch for the reinsurance. He was asked -and I'm reading [54] from page 35:

"Did you ever receive a copy of this cover note?" and the cover note is the same one that we're referring to previously. And his answer:

"No, I did not.

"QUESTION: Is it customary when you are doing business with the London market for you to receive a copy of the cover note?

"ANSWER: No, it is not. I can ask for it. It is not market practice for them to give me a copy of this for the reinsurance.

"QUESTION: Is it your understanding of the London market that this cover note represents the policy?

"ANSWER: This is a binding form of insurance. This is a confirmation of cover that if a loss occurs, underwriters are bound by this policy to the excess of $10 million."

* * * *

[56] MR. MELLOTT: Incidentally, your Honor, these same terms appear in the placing slip. And the document I'm not giving you is a part of Plaintiff's Exhibit 1. You'll see the terminology "BUSINESS INTERRUPTION (6 months Period of Indemnity)" appears in both what is called the placing slip and what is called the cover note. "Interest BUSINESSS INTERRUPTION (6 months Period of Indemnity)."

The testimony in the record from Mr. Olyslager, who has had numerous years of experience, world-wide experience in the insurance market, is to the effect that these words connote and demonstrate an American form. The language —his testimony appears on page 13 and 21, two pages of which I have introduced into evidence from his deposition. I'll only read from pages 20 and 21.

I'm not certain if I introduced 20 before. If I didn't, I will offer it at this time.

THE COURT: You did not. You introduced pages 21 through 38.

MR. MELLOTT: Well, I will need to back up to part of it on page 20, your Honor. Starting at the bottom of page 20, "Question: And opposite that word appears the words [57] 'Business Interruption 6 months Period of Indemnity'?"

"ANSWER: Yes."

This is on the cover note, your Honor.

"QUESTION: What did that mean to you, or what meaning does that have in your business?

"ANSWER: It means to me that we are dealing with an American time element cover which is limited to a 6 month period of indemnity.

"QUESTION: What do you mean by 'an American time element'?

"ANSWER: In the expressions 'Business Interruption' —" It should be, I'm sure, "If the expression 'Business Interruption' is used, it means I am dealing with an American form.

"QUESTION: You say that means you are dealing with an American firm?

"ANSWER: Form, f-o-r-m.

"QUESTION: So that then would be telling you that the primary policy is an American —

"ANSWER: American wording."

So here, Mr. Olyslager is testifying that it is clear to him from the form that this is an American wording, the primary policy is an American policy. That testimony is further confirmed, your Honor, by the testimony of another individual that has many years of experience in the [58] London insurance market, Mr. Donald Mars. Mr. Donald J. Mars. I'm reading from his deposition taken March 9th and 10th, 1978 in London, England.

THE COURT: What year?

MR. MELLOTT: 1978, your Honor.

THE COURT: '78.

MR. MELLOTT: I would offer in evidence pages 2 to 11 of that deposition, which sets forth his —

THE COURT: Just a minute. Do you want to move the admission of the portions of Mr. Olyslager's deposition?

MR. MELLOTT: Yes. I thought I already did that, your Honor.

THE COURT: I don't think you did.

MR. MELLOTT: I would offer in evidence all of those pages of his deposition that I previously referred to.

THE COURT: Do you have an objection to that?

MR. WEIS: No, your Honor. As I understand it, we'll have an opportunity to introduce the rest of it.

THE COURT: All right. So, pages 1 through 9, inclusive, pages 12 and 13, pages 20 through 38, inclusive, are admitted and made a part of the record, of Mr. Olyslager's deposition of February 28th, 1978.

[59] MR. MELLOTT: Your Honor, I —

THE COURT: You talked about Mr. Mars, is it?

MR. MELLOTT: Yes. It's the deposition of Mr. Donald J. Mars, M-a-r-s.

THE COURT: All right.

MR. MELLOTT: (continuing) —taken March 9th and 10th, 1978, in London, England in these proceedings; also attended by counsel for all parties, your Honor, including the Excess Insurer Defendants.

I offer in evidence from his deposition pages 2 to 11, which set forth his experience background. I also offer in evidence pages 16 —those portions of pages 16 and 17, which I will now read starting on page 16:

"QUESTION: Prior to May, 1974, had you handled claims for any client that were business interruption claims?

"ANSWER: If the words are restricted to business interruption, no, I did not. However, I did handle many consequential loss claims which is the European equivalent of business interruption.

"QUESTION: Would you tell me what the nature of the consequential loss claims were that you handled?

"ANSWER: Primarily resulting from material damage following upon fire.

[60] "QUESTION: Do I understand your prior answers correctly if I interpret them to be that business interruption as such is not a term used in European policies of insurance?

"ANSWER: It is not a term used in policies issued in Europe. There are many policies effective in Europe for multi-national companies wherein the insurance is back in or is lead back in in the United States and there the term appeared."

I think that should read "or is let back in the United States and there the term appeared."

"QUESTION: So that if the term 'Business Interruption' is used in a policy, it would be your experience that the insurance company knows that the coverage is written for someone in the United States, is that correct?

"ANSWER: That is correct. The term 'Business Interruption' would postulate an American form."

I might point out to your Honor that neither of these gentlemen are witnesses who are friendly to my client's position. They both represent the other side. And, consequently, these are —we submit that this, along with the affidavits, make it very clear that it was evident to the Excess Insurers that there were U.S. contacts.

Now, there are other things that make it very evident —

THE COURT: Are you going to move the [61] admission of this?

MR. MELLOTT: I thought I did, your Honor.

THE COURT: Not yet you haven't.

MR. MELLOTT: All right, I'm sorry. I apologize. I offer in evidence pages 2 to 11 of the deposition of Mr. Donald J. Mars, taken March 9 and 10, 1978, and the portions of pages 16 and 17 of that same deposition which I read.

THE COURT: Any objection?

MR. WEIS: No, your Honor, we just reserve the right, as before, to offer other portions of the deposition.

THE COURT: All right. Pages 2 to 11 and portions of pages 16 and 17 of Donald J. Mars' deposition of March

9th and 10th, 1978 are admitted into evidence and made a part of the record.

MR. MELLOTT: Your Honor, I would also like to add this additional portion from the Mars' deposition—the same one that's just been referred to and I offered into evidence—appearing at the bottom of page 17 and the top of page 18:

"QUESTION: But if they write insurance which includes business interruption claims, if your statement is correct that that term is not used otherwise, the company [62] that writes that type of insurance would know that it relates to America, wouldn't it?

"ANSWER: If a company wrote a policy of insurance which was broked to them as business interruption, I believe they would be on notice that they were dealing with an American form."

I offer that additional portion of the Mars' deposition in evidence.

THE COURT: Any objection?

MR. WEIS: No. The same reservation, your Honor.

THE COURT: All right, that portion of the deposition of Donald Mars found at the bottom of page 17 and the top of page 18 of his deposition of March 9th and 10th, 1978 is admitted and made a part of the record.

* * * *

[63] MR. MELLOTT: In addition, your Honor, many of these Excess Insurers issued numerous other policies to —

THE COURT: In regard to this case?

MR. MELLOTT: Not one that's involved in this suit, your Honor, but to the Plaintiff, who is in this suit, and to other companies: Halco Mining and Alcoa in this location. To the extent that we could locate those policies, we've offered those in evidence, your Honor. They've been attached to an affidavit of Mr. Hershey and submitted to this court, and that's one of the affidavits which I introduced earlier.

* * * *

[73] MR. MELLOTT: And I'm reading now from one of the policies which appears as part of the affidavit of Dale Hershey, which has been submitted to this court and which I introduced along with all of my offering of all of the affidavits which have been filed in this case at anytime by the Plaintiff. The policy that I'm going to read from is one identified in paragraph 7, on page 2, of an index of attached policies and cover notes attached as Exhibit A to Mr. Hershey's affidavit. And that is a policy which is dated December 10, 1973, more than a year prior to the issuance of the excess insurance coverage in this [74] case. And that includes, printed on the form, a standard service of suit clause U.S.A: "It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court."

* * * *

[80] MR. MELLOTT: Yes, your Honor. They are writing insurance. In the affidavit of Mr. Beadling—if I could refer to that again. I'm referring to paragraph 8 of Mr. Beadling's affidavit, your Honor. And your Honor will remember that he's a broker with Marsh & McLennan here in Pittsburgh. And this is an affidavit which was received in evidence this morning: "Of the 22 Excess Insurers involved in the case brought by CBG, 18 have been underwriters of risks in addition to the business interruption risk involved in this case in instances where the Pittsburgh office of Marsh & McLennan has acted as broker. In each of these instances, Marsh & McLennan acted in Pittsburgh as the agent for the London underwriters for purposes of delivering the cover note and/or policy and collecting the premium for the insured.

"In order to substantiate the foregoing [81] statements, a review has been made at my direction of insurance contracts in which the London underwriting companies have participated in coverage written for the Aluminum Company of America, Halco Mining, Inc. and CBG. The insurance contracts reviewed covering the period 1971 through December 11, '75, the date on which CBG filed its action against the Insurance Company of North America and the 22 Excess Insurers, disclose for each of the London companies the following number of insurance contracts in which that company participated during the period I have stated and as to which Marsh & McLennan acted as agent for the company in Pittsburgh. This list includes the contract in which suit is brought." And then he lists a number of these companies; the largest one being 14 insurance contracts for the Insurance Corporation of Ireland. Then he states, "This list of contracts is not exhaustive for these reasons: In that the companies may have entered other contracts for other insureds —and by that he means companies other than Alcoa, Halco Mining and CBG. He was reluctant to disclose that because they were not —those companies he felt were not involved in this case. Then "and insurance may have been placed through other Pittsburgh brokers."

* * * *

[82] MR. MELLOTT: Still reading from the Beadling affidavit, but now from paragraph 9: "The review of insurance contracts described in the previous paragraph disclosed that it is a common practice for the London underwriting companies, when providing coverage to an insured located in the United States, to include a clause in the insurance policy in which the insurers agree to be subject to suit in the United States in connection with the risk being underwritten."

* * * *

[83] MR. MELLOTT: * * * * I have a few more other things, admissions from pleadings, I'd also like to offer. But I would like to pick up just a couple of other points at this point, your Honor.

This morning, when I offered portions of the hearing before your Honor on December 21, 1978, I couldn't find at that point a portion that I wanted to include, which appears on pages 22 and 23. And I would at this time offer that part in evidence. Now, I'm reading from what the Court said —

THE COURT: Now, what page is this now on?

MR. MELLOTT: Pages 22 and 23 of the hearing on December 21, 1978: "THE COURT:" —responding to Mr. Bruckmann —"Well, I have already made my ruling. Now, [84] the question is how do I enforce it? I don't want to be unduly harsh, but you have, I don't think made a conscientious effort to get this information up to this point."

THE COURT: That is 22 and 23?

MR. MELLOTT: Right, your Honor. And then you say, "Let me tell you something. For you to know what the percentage was that you are reciting"—this is that one per cent point - "you would have had to have done this already," referring to a review of the documents. And then you later said what I read this morning and offered in evidence in which you gave them the additional 60 days or you would assume under Rule of Civil Procedure 37(b), sub-section 2(A) that there is jurisdiction.

I offer in evidence at this time these additional portions of 22 and 23 that I have just read.

THE COURT: Any objection?

Hearing no objection, the portions of the transcript; namely, parts of pages 22 and 23 of the hearing held December 21, 1978 is admitted and made a part of the record.

* * * *

[87] THE COURT: This is the February 8, '79 hearing you are talking about?

MR. MELLOTT: Your Honor, I'm sorry, I picked up the wrong note. I'm referring now to page 27 of the July 27, 1978 hearing. After referring to a lot of the points which are raised in this suit filed in England, your Honor, you know, they say -Miss D'Mato says to the Court, starting at the bottom of page 26, "... hence, they had no way of knowing that either a Pennsylvania insured was involved, not even a Pennsylvania insured, because CBG is not a Pennsylvania corporation —"

And the Court then asked this question:

"Are you alleging some sort of fraud in this transaction?

"MISS D'MATO: No, your Honor. That is just a normal course of business in London that these facts are sometimes disclosed, but it is also quite possible, and often does happen, as did happen in this case, that they were not aware of these facts."

I'll offer that portion of the transcript [88] of —

THE COURT: What facts was she referring to? What were these facts?

MR. MELLOTT: Well, that they were —that they had no way of knowing that either a Pennsylvania insured was involved, not even a Pennsylvania insured, et cetera.

Your Honor I offer that for purposes of an admission, not for purposes of proving the truth of what she says. For the purpose of showing an admission that as late as July 27, 1978 the parties were not alleging any fraud. And at that time, they clearly knew everything that they set forth in A through F of the reasons for rescission in these papers they filed in England.

THE COURT: Isn't there an admission there that CBG was not a Pennsylvania corporation, in that statement?

MR. MELLOTT: Well, yes. She said, "because CBG is not a Pennsylvania corporation." I don't think there's any question about that. We all admit that CBG is a Delaware corporation, your Honor. I cite this for purposes of saying to this court that in July of 1978, when all of the items referred to in A —I think it's A through F —of the reasons they give the English court for rescision, or voiding the contract, they knew all about that prior to July 27, 1978, and had known it for some time.

* * * *

[89] MR. MELLOTT: Furthermore, at the —now going to the February 8th —February of this year —February 8, 1979, that is, Miss D'Mato again is speaking to this court on page 27. And I offer this part in evidence. I'm quoting from here: "There is absolutely no reason to go to England —

THE COURT: What page is this, please? Page what?

MR. MELLOTT: Page 27.

[90] THE COURT: 27. All right, go ahead.

MR. MELLOTT: (continuing)—"There is absolutely no reason to go to England." This was her response in discussion with the court. "All the plaintiff has to do is register in Pennsylvania."

You know, as late as early in February of this year, at a time when they had apparently already decided to file the suit in England—although, I don't know that. That suit was filed, as I said, on the 22nd. But, certainly, there had to be a lot of work done prior to that time— they were telling this court there was no need for us to go to England to file suit.

I offer, again, that portion of the statement to this court by counsel for the Excess Insurer Defendants as an admission.

MR. WEIS: Your Honor, I object to both those last offers on behalf of the Plaintiff. What they are doing is just taking excerpts out of here and not reviewing the entire transcript and the nature and context of what was said during the course of this argument. I think if these transcripts are going to be considered by the Court, then the entire transcript should be in evidence; not just isolated portions here and there. I don't think it gives a fair impression of the argument, plus, I question the fact whether oral argument made by counsel rises to the level of evidence.

[91] THE COURT: Any response to that?

MR. MELLOTT: Well, your Honor, it seems to me that you have before you the question of the conduct of counsel and the conduct of the parties in this case. And representations which they make to this court, or concessions which counsel make as to the facts, are clearly binding on the parties; and, certainly, are available for consideration by your Honor on the question of whether there has been good faith in this total prosecution of this case.

Your Honor, I don't know—in fact, I do not believe that it is essential for me to offer these arguments before the court because they are part of the record, and on the nature of the matter pending before the court you can probably take all of those into consideration. But I did want to offer certain specific parts to be sure that they were before the court and being considered by the court at this time.

THE COURT: Do you have to register to take advantage of the Long-Arm Statute here in Pennsylvania?

MR. MELLOTT: No, your Honor. And I know we have cases in our brief to that effect, that support that. You do not have to register in Pennsylvania in order to come into Pennsylvania and sue. In fact, I think it would be a violation of the Commerce Clause for the state to forbid the use of its courts to a non-resident who wanted to sue in [92] this court where there was jurisdiction and venue for the proceeding. So, I think it's clear that there is no need to register in order to file suit here. Those are two independent questions. The question of whether you have to register or not is a question which this court has already dealt with here in holding that's been waived because it was not asserted at an appropriate time. In fact, there was delay in asserting that for several years.

I also say, of course, that there was absolutely no basis for it, in any event; there was no need to register. But we don't need to go into that point; that's not before this court at this time.

In any event, your Honor—

THE COURT: Well, just a minute now. We have to rule here on these objections. So, the Court's going to overrule the objection and allow page 27 from the February 8, 1979 hearing in evidence; that is, the statement of counsel that in her opinion she thought there was no need to go to England and all the Plaintiff had to do was register in Pennsylvania.

All right, let's go ahead.

MR. MELLOTT: Your Honor, does that ruling apply to what I offered previously from the transcript of July 27, 1978? Because, I believe the objection went to both of them.

THE COURT: Well, if I haven't ruled on [93] them, I am allowing both of them in; that is, page 27 of the July 27, '78 transcript, which had to do with the question of fraud, if I recall—

MR. MELLOTT: In the July 27th transcript your Honor, I believe I offered—

THE COURT: Page 27.

MR. MELLOTT: (continuing)—page 26 and—part of page 26 and—

THE COURT: I didn't notice anything on 26, but maybe you did.

MR. MELLOTT: Well, I started at the bottom of page 26 and the top of page 27, the part that I read.

THE COURT: All right. We're going to admit the bottom of 26 and the top of 27 of the July 27, 1978 transcript. That had to do with the question as to whether or not the Excess Insurers were claiming fraud; is that correct?

MR. MELLOTT: That's right, Your Honor. They said they were not claiming fraud.

THE COURT: All right. We admit that and make it a part of the record.

MR. MELLOTT: As well as the portion from page 27 of the February 8, 1979 hearing?

THE COURT: I've already admitted that.

* * * *

[94] THE COURT: Where is that exhibit you were going to put in that you haven't put in yet?

MR. MELLOTT: I have it here, your Honor. I also have to offer some admissions from the pleadings as yet, then I'll sit down and let the other side talk.

Your Honor, I would like to offer in evidence at this time some admissions from the Amended Answer of the

Excess Insurer Defendants. I have previously offered the Complaint in evidence. I would first offer in evidence paragraph 13 of Count II of the Excess Insurers' Amended Answer to the Complaint in this case. And in that they have admitted the following allegations of paragraph 13 of the Complaint: "The Defendant corporations, excluding INA, which is not included in [95] this Count II, are incorporated in states or countries other than the State of Delaware and have their principal place of business in states or countries other than the State of Delaware.

"The Defendant Hanover Insurance Company is a foreign insurance company licensed to transact business in the Commonwealth of Pennsylvania.

"The Defendants Excess Insurance Company, Limited and English & American Insurance Company, Limited are authorized to transact business in the Commonwealth of Pennsylvania as surplus line carriers."

I offer in evidence the following portion from paragraph 16 of Count II of the—

THE COURT: Well, let's get a ruling here. Do you have any objection to paragraph 13, Count II, in the Excess Insurers' Amended Answer?

MR: WEIS: Not if he is reading it in its entirety.

THE COURT: I don't know whether he is. I don't have them in front of me.

MR. WEIS: I don't either. That's why I'm saying that, your Honor.

THE COURT: Did you read it in its entirety?

MR. MELLOTT: I read—your Honor, from their Answer, they say the first three sentences are admitted. I

[96] read the three sentences which are admitted. There's no qualification on the admission of those sentences.

MR. WEIS: There is nothing else in that paragraph, page —

THE COURT: I don't know.

MR. MELLOTT: Well, there's something else in paragraph 13, but I do not feel that I have an obligation to offer your affirmative allegations.

MR. WEIS: Then, I object, your Honor, unless the entire paragraph is put in evidence.

THE COURT: Well, you can put the rest of the paragraph in if you wish, Mr. Weis, if you want to supplement it when your time comes.

So, we're going to admit paragraph 13, Count II as stated to that extent.

Now, what's the next one? Paragraph what?

MR. MELLOTT: Paragraph 16.

THE COURT: Of which count?

MR. MELLOTT: Of Count II, your Honor.

THE COURT: This is the Excess Insurers Amended Answer?

MR. MELLOTT: The Excess Insurers' Amended Answer. I'm reading from that paragraph: "Exhibit 2 is admitted."

[97] THE COURT: And what is Exhibit 2, just for the record?

MR. MELLOTT: It's the cover note, your Honor.

THE COURT: All right.

MR. MELLOTT: A copy of which I showed your Honor this morning. They also say in that paragraph: "It is averred that the Defendants agreed to the cover note referred to in Exhibit 2, subject, however, to all of its terms and conditions."

I, also, offer in evidence the admissions from Paragraph 17—

THE COURT: Well, just a minute now. Let's rule on this one.

MR. MELLOTT: All right.

THE COURT: What about Paragraph 16, Count II, with reference to Exhibit 2, the cover note.

MR. WEIS: I have the same objection, your Honor, as to Paragraph 13.

THE COURT: Well, we'll allow you to explain it or add to it, if you wish, when your time comes.

So, we're going to admit it for whatever it's worth.

Move on to your next one. Paragraph 17, did you say?

[98] MR. MELLOTT: Yes, your Honor.

THE COURT: Count II.

MR. MELLOTT: This is paragraph 17 of Count II of the Excess Insurers' Amended Answer. I'm reading from that paragraph: "The insurance provided by cover note 4093011 in the amount of 10 million applies only to losses which are covered by it, and also before any liability attaches to these defendants the terms and conditions of the policy must be complied with. It is admitted that any coverage owned by these defendants—" and I assume that meant "owed"—"would be excess coverage. The initial coverage would be that provided by INA Policy Number 71 HF 1195, which would be primary coverage. In any event, said cover note provided that the coverage would be 'excess of U.S. 10 millions each and every loss'."

THE COURT: That's paragraph 17, Count II.

MR. WEIS: Same objection.

THE COURT: All right, we'll overrule it and allow you to explain it or comment on it when your time comes.

MR. MELLOTT: Further, in paragraph 26 of the Excess Insurers' Amended Complaint, in their 5th defense: "It is further avered that Exhibit 2, the cover note referred to in Plaintiff's Complaint, is a true and correct copy."

I offer that admission in evidence.

[99] THE COURT: Any objection?

MR. WEIS: Same objection.

THE COURT: Okay. We'll overrule the objection with the understanding that the Excess Insurer Defendants will be entitled to explain or add to the exhibit if they wish.

* * * *

[102] THE COURT: Well, I think that has to do with your argumentation, if you are going to argue that. I know for a fact that Mr. McConnell is here and he's not complaining about jurisdiction.

MR. MELLOTT: That's right, your Honor.

THE COURT: I mean, that is something I can notice.

MR. MCCONNELL: Unfortunately, I represent [103] a Pennsylvania Defendant [INA].

MR. MELLOTT: And you're not contesting diversity jurisdiction either, are you?

MR. MCCONNELL: Well, I haven't raised it.

THE COURT: He's not contesting any jurisdiction.

MR. MELLOTT: That's right, your Honor.

THE COURT: He's coming in on the merits, as I understand it.

MR. MCCONNELL: Right.

* * * *

MR. MELLOTT: But I just want to make clear that the record discloses that there are four Excess Insurers [104] who are not contesting the jurisdiction, and those are: Eagle Star Insurance Company, Limited; Hanover Insurance Company; Home Insurance Company, Limited; and Turegum Insurance Company.

If the Court please. I offer in evidence Plaintiff's Exhibit 3 for the purpose of showing an admission by Eagle Star Insurance Company, Limited (one of the Excess Insurer Defendants) that in 1975 it wrote insurance and obtained premiums in Pennsylvania in the total amount of $108,255.00. This is one of the documents produced for us by the Excess Insurer Defendants.

I also offer in evidence Plaintiff's Exhibit 4 for the purpose of showing an admission by the Hanover Insurance Company (one of the Excess Insurer Defendants), that in 1975 it wrote and received direct premiums in Pennsylvania in the amount of $4,188,528.00.

There are the figures that I referred to earlier today, your Honor.

Have you ruled on those, your Honor?

THE COURT: Well, I will be glad to, if you want to move their admission.

MR. MELLOTT: Yes, I move their admission, your Honor.

THE COURT: Okay. Do you have any objection to Exhibits 3 and 4?

MR. WEIS: Not if it's what we furnished [105] them; naturally not.

THE COURT: All right.

* * * *

MR. MELLOTT: Your Honor, I also offer in evidence Plaintiff's Exhibit Number 2, which is a summary which we prepared from the pleadings, affidavits, motions and briefs filed by the Excess Insurer Defendants, showing inconsistent statements and submissions to the court, and the references to the particular papers are set forth in that document.

THE COURT: Did you give a copy of that to the opposition?

MR. WEIS: I got a copy of this, your Honor.

MR. MELLOTT: Yes. I gave that to them the first thing this morning, your Honor.

[106] MR. WEIS: And I would object.

THE COURT: You do object?

MR. WEIS: Absolutely.

THE COURT: Well, we'll just accept it for what it's worth. I am not going to, necessarily, give it any probative value. But we'll overrule you at this time pro forma on that one.

MR. MELLOTT: All right.

THE COURT: I am not, necessarily, going to give that any probative value; that is, Exhibit 2.

MR. MELLOTT: Well, your Honor, the particular references that are there are all matters of record before this Court.

THE COURT: Well, I don't know. I haven't seen it yet. But I've overruled Mr. Weis pro forma on that.

MR. MELLOTT: Thank you.

THE COURT: Any thing else?

MR. MELLOTT: That's all I have.

* * * *

[107] (Whereupon, a recess was had.) (In Open Court)

THE COURT: Okay. I guess we want to hear from the Excess Insurers.

MR. BRUCKMANN: Good afternoon, your Honor. My name is Mark Bruckmann and I represent the Excess Insurers in this action.

* * * *

[115] MR. BRUCKMANN: The English action is, strictly speaking, not required. Under English law, the policy has been avoided. As a matter of English law, it is non-existent at this time.

THE COURT: You mean English law is self-enabling? I mean—

[116] MR. BRUCKMANN: Under English law, if there has been a non-disclosure—which the Excess Insurers contend due to the fact that the structual cracking, which the Plaintiff knew prior to the existence of coverage, was not disclosed—this fact enabled the Excess Insurers to rescind policy when it comes to light. Not rescinded. Let me—

THE COURT: Excuse me. Just to be helpful, though. Some judicial body has to put the imprimatur of truth on that.

MR. BRUCKMANN: No, your Honor.

THE COURT: Who, in the long-run, determines whether or not it's void ab initio or not?

MR. BRUCKMANN: The insurers have the right, when faced with a non-disclosure, to void the policy ab initio. When they do, it is void and continues to remain void until the insured gets a judicial determination in the High Court of London saying that the insurers had no right to void the policy. Until that's done, the policy is void as a matter of English law.

As it stands now, there is no insurance policy under English law. The action was commenced after the policy was avoided so that we would get the stamp of approval of the English court, which we could then bring to this court to show what transpired.

THE COURT: Well, you don't contend—[117] or do you contend that if the English court would give the stamp of approval on your contention, then you would come here and say there is no policy, and that would be your defense; right?

MR. BRUCKMANN: Yes, your Honor. The policy has been avoided ab initio, and our defense here would be there is no policy.

THE COURT: All right, go ahead.

* * * *

[229] THE COURT: Wasn't that policy delivered right here in Pittsburgh?

MR. BRUCKMANN: The question —yes. No. Let's straighten that up. There was no policy issued. And Mr. Mellott has been going on at great length that if a policy had been prepared, it would have contained a service of suit clause. But there's no basis in the record to support that. His own affidavits that he procured from Bland Payne state that Bland Payne was to prepare the policy, and they didn't do it. There was a failure of Bland Payne. I would like to read the pertinent portion of his own affidavit, your Honor, which he clearly ignores.

[230] THE COURT: His? Who is "his"?

MR. BRUCKMANN: The affidavit submitted on behalf of the Plaintiff. Mr. Mellott has gone on and on that these Excess Insurers were somehow faulty for not preparing the policy wording, but this is the affidavit of David Glynne-Jones submitted on behalf of CBG. Now, I'll read the pertinent paragraph, Paragraph 6. I'll read the thing in its entirety.

"To the best of my knowledge underwriters who do business in the London market, such as the twenty-two companies with which the C.B.G. business interruption cover was placed, do not maintain extensive files with respect to the placement itself. Such insurers are familiar with the manner in which coverage is placed in the London insurance market. On receipt of instructions to seek coverage in the London market the broker prepares a slip upon which he sets out in a conventional manner details of the risk and the coverage required. The slip is then taken to those underwriters who in the brokers experience are likely to be interested in participating in such an insurance. It is usual to approach first an underwriter who is of acknowledged experience in the particular field and the level of premium which he will agree is then usually accepted by subsequent subscribers. Each underwriter is presented personally with the slip by the broker and has the opportunity to ask questions of the broker regarding any matter material to the placing. I have described the placing procedure in its [231] simplest form. In some cases it is necessary for the broker to see the underwriters on a number of occasions and refer back to the principal —"his principal" as necessary before all the terms are agreed and the slip fully subscribed. When the risk has been fully subscribed, for the benefit of the insured the broker prepares a cover note indicating the identity of the underwriters—" I'd like to just emphasize that little point again. For the benefit of the insured, the broker prepares a cover note, not the insurers.

MR. MELLOTT: Of course, you are not reading from the affidavit at this point.

MR. BRUCKMANN: (continuing)— "indicating the identity of the underwriters, the shares of their participation in the underwriting, and the basic terms on which they agreed to provide coverage. In a placing of this kind, which refers to the wording of the underlying coverage, upon receipt of the underlying wording the broker prepares the excess policy for the approval and signature of the excess underwriters and then transmits it to the insured through the producing broker."

Thus, your Honor, Bland Payne was to prepare the policy wording and present it for signature.

Now, this affidavit was seconded by two other individuals at Bland Payne—

MR. MELLOTT: If the Court please. I believe that Mr. Bruckmann indicated that he was going to read [232] the whole paragraph.

MR. BRUCKMANN: I did.

MR. MELLOTT: He did not. He did not read the last part of the paragraph, and I will now read it for the record:

"The broker receives the premium from the producing broker who collects it from the insured, and the premium is credited to accounts maintained by the broker for the underwriters, or if there are no such accounts, is paid to the underwriters directly."

* * * *

[248] MR. BRUCKMANN: Well, your Honor, at this time, so we know what's before the Court, Mr. Mellott has entered as evidence affidavits, and we would also like to move and have the affidavits of the Excess Insurers submitted in July of 1976 and in 1977 also admitted.

THE COURT: Do you have them marked in some manner?

MR. BRUCKMANN: All right. We have not prepared —they are already submitted to the court previously.

THE COURT: Well, what are they attached [249] to? Affidavits attached to what?

MR. BRUCKMANN: Well, they are in support of our motion for summary judgment on the basis that there is no personal jurisdiction. They are submitted with our briefs in July of '78. And I believe the first affidavits were submitted to the court in March of '77? Approximately that time.

THE COURT: Are you well acquainted with what he is speaking of?

MR. MELLOTT: I know—I don't have all of the language of those affidavits in front of me, but I guess he's talking about the affidavits he submitted along with his motion, your Honor.

MR. BRUCKMANN: Yes, those are the ones.

MR. MELLOTT: And I object to the introduction of those affidavits in evidence to the extent that they purport to set forth facts that are not based on knowledge, and to the extent that they set forth opinion testimony or opinions because I haven't had the right to cross-examine, and they're not appropriate for that purpose.

And furthermore, I submit that those affidavits are irrelevant to the matters before this court at this time.

THE COURT: Well, we'll overrule you pro forma on that—

MR. MELLOTT: All right, your Honor.

* * * *

[270] MR. WEIS: I will be very brief, your Honor. First, I would like to read into the record paragraph 16 of the Excess Insurer Defendants' Answer, a portion of which was read yesterday. So, I would just like to read the whole thing. 16 reads as follows: "Denied as stated. It is admitted that Bland Welch & Company, Ltd. on April 10, 1974 issued cover note number 4093011 to C.B.G. The remaining allegations of the sentence of this paragraph are denied as stated. Exhibit '2' is admitted. The remaining allegations of this paragraph of Plaintiff's Complaint are denied as stated. It is denied that Bland Welch &

Company, Ltd. were the agents, servants or employees of these defendants. It is averred that the defendants agreed to the cover note referred to as Exhibit '2' subject however to all of its terms and conditions. It is further averred that each of these defendants agreed and acted solely on their own behalf and not on the behalf of any of the other defendants, and each of the defendants individually aver that its liability is limited to the percentage amount shown in the writing attached to the cover note referred to as Exhibit '2'. It is averred that the application for insurance from these defendants was made at London, England, that the cover note was issued and delivered at London, England and that the premiums for said policy were paid at London, England."

* * * *

[275] THE COURT: I don't think there is any need for you to make any more speeches here, Mr. Mellott. I'm going to make my decision right now.

MR. MELLOTT: Well, could I just say two things, your Honor?

THE COURT: All right, two things.

MR. MELLOTT: First of all, in connection with our position that this Court should find in personam jurisdiction and impose the sanctions that you indicated in the December hearing that you would do, I would like to have marked and offer in evidence an affidavit of my partner, Dale Hershey, with reference to the type of documents that were produced by the Excess Insurer Defendants, your Honor.

THE COURT: Is your argument that [276] they were adequate or not?

MR. MELLOTT: That they were not adequate, your Honor, and that they did not comply with this Court's order. It will also show that statements made to your Honor just in the prior argument by Mr. Bruckmann as to the extent of the business done by these Excess Insurers in this jurisdiction are not correct.

MR. WEIS: I object to the last offer, your Honor. It's not what Mr. Hershey's opinion is as to whether it did or didn't comply with the court's order. I think that is up to the court on a review of the documents as to what we have complied with.

THE COURT: All right. We'll accept the affidavit and overrule the objection. I will read it and see what he says and make a determination after I get a chance to read it.

May I take a look at it, Mr. Mays —

(Whereupon, the aforementioned document was passed to the Court.)

THE COURT: (continuing) —and see what it contains, if you will? Is this supposed to be marked as an exhibit or what?

MR. MELLOTT: We ask to mark it as an exhibit.

THE COURT: He has marked it filed, if [277] you want to mark it as an exhibit?

MR. MELLOTT: Well, I want to offer it as an exhibit in this proceeding, your Honor. Now, whether it's —

THE COURT: All right, put it down as an exhibit, Mr. Mays.

MR. MAYS: Number 5.

MR. MELLOTT: All right, Plaintiff's Exhibit Number 5.

Plaintiff's exhibits 1C, 3, 4 and 5 appear at pages 477a-485a, 485a, and 487a, respectively, infra.

[284] (In Open Court)

[3]* THE COURT: The Court will make the following findings of fact:

First, the Plaintiff, Compangnie des Bauxites de Guinee, hereinafter referred to as CBG, is a Delaware Corporation.

CBG is owned 49 per cent by the Government of Guinea and 51 per cent by the Halco Mining Company, a Delaware Corporation which is licensed to do business in Pennsylvania. Halco, in turn, is owned by a group of six aluminum manufacturers domiciled in Europe and in North America. Two of the six aluminum companies (Aluminum Company of America and Martin Marietta Aluminum, Inc.) are United States Corporations. Aluminum Company of America is a Pennsylvania Corporation headquartered in Pittsburgh.

The sole business of CBG is the mining of bauxite ore, from which aluminum is made, in the Republic of Guinea.

The Court notes parenthetically that the law suit which has been filed in the British Isles admits that the principal business is conducted in the Republic of Guinea.

The Plaintiff, CBG, alleges, and the Defendant, Insurance Company of North America (one of the Defendants herein) admits that the CBG principal place of business is outside the territorial limits of the United States.

*[Transcribed separately]

The Court [4] expressly finds that CBG is not an alien corporation inasmuch as the said corporation is a Delaware Corporation.

The Defendant Insurance Company of North America is a Pennsylvania Corporation, having its principal place of business in Pennsylvania. The Court notes that the Insurance Company of North America does not challenge the in personam or subject matter jurisdiction of this court.

The remaining 21 insurance companies who are the Defendants in this case do business in the London insurance market and, also, they do business in various parts of the world, including the United States, and including Pennsylvania. They are hereinafter referred to as the Excess Insurer Defendants, or the Excess Insurers.

Of the 21 Excess Insurers, five are English companies representing English domestic interests but insuring risks throughout the world, particularly in Pennsylvania. Seven are English companies which represent non-English parents, or affiliates. The United States, Japan and Israel are the nationalities of two each of the Excess Insurer Defendants. Switzerland and the Republic of Ireland are the nationalities of one each of the Excess Insurer Defendants. The remaining Excess Insurer Defendant is a Belgium Company which represents the United States parent.

Now, the Court finds that all of these companies have been and are doing business in the United States [5] and, more particularly, in the Commonwealth of Pennsylvania.

The Defendant INA issued insurance policy number 71HF1195 to CBG covering business interruption losses occurring at CBG's facility in Guinea for the period commencing February 12th, 1974. The policy provided coverage on an all-risk basis for losses up to 10 million dollars each and every loss. The insurance policy was issued in Pennsylvania, was delivered to the Plaintiff, CBG, by Marsh & McLennan, an insurance brokerage firm, with a letter dated June 11, 1974. The Excess Insurer Defendants agreed to provide business interruption coverage to CBG for a period of 12 months after February 12th, 1974 covering losses of 10 million dollars in excess of the 10 million covered by INA for each and every loss.

The Excess Insurer Defendants did not issue a policy to CBG in connection with the aforementioned underwriting; however, they do not deny they agreed to provide the coverage, and it has been agreed that they adopted the terms of the underlying INA policy, which policy was written by a Pennsylvania Corporation.

Marsh & McLennan delivered a "cover note" to CBG in Pittsburgh with its letter of June 11, 1974, accompanied by the INA policy. The "cover note" informed CBG that the excess coverage had been placed with the Excess Insurer Defendants on the same terms as the coverage provided by [6] INA.

On December 11th, 1975 CBG commenced this action against INA and the Excess Insurer Defendants alleging the Defendants are liable under the insurance contracts because the covered business interruption losses were suffered due to incidents which occurred in Guinea while the insurance contracts were in effect.

This Court has in personam jurisdiction over the Defendant INA, and this Court has in personam jurisdiction over the 21 Excess Insurer Defendants.

The Excess Insurers agreed to stipulate that they derived at least one per cent of their premium income from Pennsylvania. Even though this proposed agreement was never taken up, the Court will deem it to be an admission.

The Excess Insurers provide coverage to various types of citizens of Pennsylvania. They cover risks located in Pennsylvania and they provide coverage through brokers having offices in Pennsylvania.

To show the full extent of the business done by the Excess Insurers connected with Pennsylvania, this Court, on July 27th, 1978, ordered the Excess Insurers to produce all insurance contracts which they had written since 1971 in which they provided coverage to Pennsylvania insureds, including Pennsylvania risks, or provided coverage through Pennsylvania brokers.

[7] The Excess Insurers, through their attorneys, promised on several occasions to comply with this Court's order, and obtained extensions of time in order to comply. The Excess Insurers produced only a few of the insurance contracts requested, and under the circumstances the Court feels that the Excess Insurers have not offered the necessary assistance to the various brokers in gathering documents and getting the requested information which would be necessary under the circumstances.

This Court, after some months of further delay, on December 21st, 1978, stated that if the Excess Insurers were to fail to produce the requested information within 60 days from that date, the insurance contracts, which were subject to its order of July 27, 1978, and showing the extent of the business contacts with Pennsylvania, that this Court would impose a sanction consisting of a finding that the Excess Insurers are subject to the in personam jurisdiction of this Court because of their business contacts in Pennsylvania.

The Court has considered an affidavit; namely, Plaintiff's Exhibit 5 submitted in this case. The Court has looked through the voluminous documents and papers in this case, and the Court finds, as a fact, that the material promised this Court by the Excess Insurers on December 21st, 1978, and prior to that time on July 27th, 1978, have not—[8] this material has not been forthcoming, and the Court, at this point, will rule and impose a sanction, and does find that the Excess Insurers are, in fact, subject to the in personam jurisdiction of this court.

The Court further finds that the underlying insurance contract furnished by INA, by implication, by its terms includes and covers the Excess Insurers, and the Court finds that as a term of the underlying insurance of INA that the Excess Insurers agreed to submit to this Court's jurisdiction, in personam jurisdiction. And the Court finds that that is a second ground for the exercise of this Court's jurisdiction, and also as a further foundation for this Court's holding that this Court, in fact, does have in personam jurisdiction.

The Court further finds that under the admitted facts and known facts, that the Excess Insurers are, in fact, doing business in Pennsylvania and that they derive profits from the writing of insurance coverage connected with Pennsylvania; more particular, they wrote the policy in question knowing that it would be sent to Pennsylvania and that money would be forthcoming from sources in Pennsylvania. And the Court, under those circumstances, invokes the Pennsylvania Long-Arm Statute, which further substantiates this Court's ruling that this Court does, in fact, have in personam jurisdiction.

On March the 22nd, 1979, the Excess [9] Insurer Defendants instituted suit against CBG in the High Court of Justice in the Queen's Bench Division, the Royal

Courts of Justice, at 1979-I Number 1727, in London, England. In that suit, they sought a declaration that they are entitled to avoid the contract of insurance and, further, an order that the contract of insurance is avoided on the ground of a material non-disclosure.

This Court notes that in the pleading in this case that the 6th defense of the Defendant Excess Insurers' Amended Complaint substantially raises the same identical questions, that is, as to whether or not there was a material non-disclosure of prior damage to the tippler building of the Plaintiff, which building is situated in the Republic of Guinea, and whether or not the knowledge of this prior damage, if known to the Plaintiff, should have been disclosed to the Excess Insurers.

The Court finds that the circumstances and the substance of the litigation in London is substantially identical in all respects to the litigation now before this Court.

The Court finds as a fact that the action of the Excess Insurers in prosecuting litigation in London, England, which is substantially identical with the litigation now before this Court, is a duplicate litigation. And the Court further finds that all parties, including the Excess [10] Insurers, will suffer irreparable harm if this action is allowed to persist wherein litigation which is substantially identical will be prosecuted in two different courts on two different continents involving the same subject matter and the same defenses, and also the same insurance contract which is now before this Court.

This Court concludes as a matter of law that it has, in fact, in personam jurisdiction over all of the Defendants, including INA and the 21 Excess Insurers.

The Court finds as a matter of law that it should impose a sanction on the 21 Excess Insurers for failing to produce the requested documents that would have disclosed the extent of their business contacts in Pennsylvania with Pennsylvania businesses. And the Court finds under the applicable Rules of Federal Civil Procedure that this Court can, and does, impose the sanction: and for the purpose of this litigation the Excess Insurers are subject to the in personam jurisdiction of this Court due to their business contacts with Pennsylvania.

The Court also heretofore mentioned, and will mention again, that it finds as a matter of law that the Pennsylvania Long-Arm Statute brings the Excess Insurers before this Court.

The Court also finds that this Court has jurisdiction by virtue of the diversity of the parties and [11] the fact that this matter is concerning a subject matter of a value much in excess of the sum of 10 thousand dollars.

This Court finds that in personam jurisdiction is also grounded, as a matter of law, on the fact that the Defendants have derived profit out of Pennsylvania (however small) and that, admittedly, this contract consisted of a coverage and risk which were written through Pennsylvania brokers and the monies involved in paying for the coverage came from Pennsylvania brokers, and from Pennsylvania, to the several named Excess Insurers.

The Court further finds in personam jurisdiction because it's a matter of common business usage and common business practice for an insurer under these circumstances, underwriting for the business situation here present, that INA, in its policy of insurance, agreed to submit to the jurisdiction of this United States and to designate the Insurance Commissioner of Pennsylvania as agent for the service of process; and the Court finds that such a concession by the Excess Insurers to this jurisdiction was implied under the terms of the insurance contract which was provided via the business interruption coverage for the Plaintiff, CBG.

The Court finds that it would be inequitable, inefficient and unfair to require CBG to defend two law suits involving substantially the same issues, same defenses, same insurance, in two different courts and on two [12] different continents.

The court finds that it would be inequitable and oppressive for them to defend duplicate law suits, as here and above mentioned, under these circumstances.

MR. MELLOTT: The Court -

THE COURT: Pardon me?

MR. MELLOTT: Could I just interrupt for a minute? I wonder if you meant "to participate." Because, in the one case, of course, we are the Plaintiff, we are not the Defendant.

THE COURT: Well, "to participate in." I will amend that.

MR. MELLOTT: To participate.

THE COURT: "To participate in." Although, I don't want my statement here in this particular order —it was my understanding that the argument was made by the Excess Insurers that this thing operated automatically; that is if the policy is voided ab initio that you would have to prosecute the case in England?

MR. MELLOTT: But we would be the Defendant in England.

THE COURT: Well, I'm not too sure about that, whether you would be the Defendant in England or not. I think you might have to be the prosecutor in England, assuming what Mr. Bruckmann says is true. I don't know.

[13] MR. BRUCKMANN: Your Honor, I think they could appear in that action and be the Defendant. The remedy —

THE COURT: If the policy is void ab initio, it seems to me that the burden then would be on them to prosecute the case to show that the policy, in fact, is in force, and the burden would be on CBG in England.

MR. BRUCKMANN: That's correct, your Honor. But since we have an action pending already in England, they would simply have to appear in that action.

THE COURT: Well, I don't know. I'm not an expert on English Law. But we're going to use the word "participate" then.

MR. MELLOTT: All right, you Honor.

MR. BRUCKMANN: Thank you.

THE COURT: And that will cover it.

The Court finds that the commencement of the separate action in England while the present action is pending before this Court is oppressive, unfair, and an act of bad faith under all of the circumstances.

This Court finds that it has the authority to preserve its jurisdiction and prevent duplicate litigation under these circumstances. And the Court may do so by enjoining the Excess Insurers from further commencing or prosecuting or maintaining the action, that we have here and above referred to, [14] in the English Courts.

This Court has the jurisidiction to order that the Excess Insurers be preliminarily enjoined from further maintaining or prosecuting or in any way participating in the action here and above referred to as a suit instituted against CBG in the High Court of Justice, Queen's Bench

Division, Royal Courts of Justice, at 1979-I, Number 1727 in London, England.

And the Court further finds that the evidence as presented, in its entirety, indicates that the facts heretofore found by this Court are certain of proof at a final hearing in this matter.

The Court finds, as a consequence, the probability of success on the part of the Plaintiff, CBG, in showing what has transpired can be proved.

The Court finds that the Plaintff, CBG, would suffer irreparable harm if a preliminary injunction is not granted in this case.

It further is a finding of the Court that there have been several questions of law here raised, which are serious questions, and these questions are the proper subjects of this Court's consideration and make them a fair ground for determination by this Court as the United States District Court for the determination of said questions concerning in personam jurisdiction and other matters which this Court has discussed.

[15] The Court finds that the balance of hardship under the facts of this case, and in light of the law as the Court has found it to be, decidedly tips the balance of hardship in favor of CBG and requires that we grant CBG the preliminary relief requested.

And the Court will now make the following order:

AND NOW this 19th day of April, 1979, upon consideration of the Plaintiff's Motion For Preliminary Injunction, and after hearing the arguments of counsel and the evidence as presented, it is hereby ORDERED that the Excess Insurer Defendants, their attorneys, employees and agents shall immediately, upon service of this Order, discontinue any further prosecution of the suit instituted by them in the High Court of Justice, Queen's Bench Division, 1979-I-No. 1727; that the Excess Insurer Defendants, their attorneys, employees and agents shall desist from filing any other actions against Compangnie des Bauxites de Guinee relating to issues and matters now before this Court during the pendency of the present action in this Court; that service of this Order shall be deemed to be effective upon delivery of a copy of the Order to the Pittsburgh counsel of the Excess Insurers; that supplementary service of the Order may be made by the delivery of copies of this Order to the London offices or the London counsel of the Excess Insurers by any competent adult; and that the [16] Excess Insurer Defendants shall reimburse the Plaintiff for its costs, not including reasonable attorney's fees, that is, for expenses of traveling, and so forth, incurred in the prosecution of this present Motion and incurred in responding to the aforementioned action filed by the Excess Insurers in the High Court of Justice, London, England.

A hearing on a permanent injunction in this matter will be held in this court room on June the 25th at 9:30.

No further notice will be given.

[W.D. Pa. Title not printed]

PLAINTIFF'S MOTION FOR CONTINUANCE OF INJUNCTION HEARING

Plaintiff Compagnie des Bauxites de Guinee ("CBG") moves this Court for an order continuing the injunction hearing, now scheduled to take place on August 8, 9, and 10, 1979, to a time following a ruling by the United States Court of Appeals for the Third Circuit on the appeal from the preliminary injunction issued by this

Court on April 19, 1979. In supports of its motion, Plaintiff CBG states as follows:

1. On May 11, 1979, during a conference with counsel, the Court set August 8, 9, and 10, 1979 as the dates for a hearing on a permanent injunction to enjoin the Excess Insurer Defendants from continuing to prosecute the suit which they have filed against CBG in London. Counsel for CBG agreed to those dates for the hearing on the assumption that the subject of the hearing would be limited to the question of whether a permanent injunction should issue.

2. Following the conference with the Court on May 11, 1979, counsel for CBG met with counsel for the Excess Insurer Defendants to discuss discovery to be taken. During the discussions it became evident that counsel for the Excess Insurer Defendants may use the hearing as an occasion for reopening the question of whether the Court has in personam jurisdiction over the Excess Insurer Defendants and/or subject matter jurisdiction over this controversy.

3. The only proper subject for the hearing is whether a permanent injunction should issue. The Court should not reopen the questions of in personam jurisdiction or subject matter jurisdiction, those questions having been determined by this Court's rulings of April 19, 1979. The Plaintiff opposes the holding of any hearing on in personam and/or subject matter jurisdiction and requests that the hearing be postponed until after the Third Circuit has ruled upon the preliminary injunction for a stay of proceedings in London. At that time the issues before the Court will be clarified and defined by the Third Circuit's rulings.

4. The issue of in personam jurisdiction was presented for decision by this Court by the first summary

judgment motion filed by the Excess Insurer Defendants on May 20, 1977. That issue has already been fully briefed and argued, and has been decided by this Court. The Court's ruling of April 19, 1979 is, in effect, a denial of the motion for summary judgment on in personam grounds, as well as a preliminary injunction order. To the extent that the order of April 19, 1979 deals with in personam jurisdiction, it is a final determination of that issue, not subject to the holding of further hearings or the admission of further evidence.

5. The issue of subject matter jurisdiction, based upon the alleged lack of diversity between CBG and Defendant Insurance Company of North America, was finally ruled upon by this Court at the hearing on April 18 and 19, 1979. At that hearing, because of the inconsistent positions taken by the Excess Insurer Defendants regarding the locale of CBG's principal place of business, the Court denied their second motion for summary judgment.

WHEREFORE, this Court should not hold the permanent injunction hearing as scheduled but should postpone it to a time following the ruling of the United States Court for the Third Circuit on the preliminary injunction.

CLOYD R. MELLOTT

DALE HERSHEY

JORDAN WELTMAN

Eckert, Seamans, Cherin &
Mellott
Attorneys for Plaintiff

* * * *

[W.D. Pa. Title not printed]

ANSWER TO PLAINTIFF'S MOTION FOR CONTINUANCE OF INJUNCTION HEARING

First Defense

Plaintiff's Motion fails to state any ground for continuance of the hearing.

Second Defense

1. The averments of the first sentence of paragraph 1 are admitted. Defendants are without knowledge sufficient to form a belief as to the truth of the averments of the second sentence of paragraph 1 for the reason that any assumptions made by plaintiff's counsel were not audibly expressed.

2. The averments of the first sentence of paragraph 2 are admitted. In answer to the second sentence of paragraph 2 defendants aver that their counsel stated that he could not state what position he would take at the hearing scheduled to begin on August 8 because he had not attended the preliminary injunction hearing and had not received the transcript thereof. Counsel has not yet received a transcript of said hearing.

3. No answer is required to paragraph 3 because it contains no averments of fact, but only conclusions of law, contentions and argument.

4, 5. No answer is required to paragraphs 4 and 5 because they contain no averments of fact, but only recitals of matters of record, as to which the record speaks for itself, and contentions and argument.

Third Defense

Plaintiff's motion is premature because defendants are not alleged to have said or done anything. The only basis alleged by plaintiff for its motion is (2) that "During discussions it became evident that counsel for the Excess Insurer Defendants may use the hearing as an occasion for reopening the question of whether the Court has in personam jurisdiction over the Excess Insurer Defendants. . . ." (Emphasis supplied).

EDMUND K. TRENT
Reed Smith Shaw & McClay

Attorneys for excess
insurer defendants

[W.D. Pa. Title not printed]

NOTICE OF DEPOSITIONS

To: Dale Hershey, Esquire
Eckert, Seamans, Cherin
& Mellott 3180
U.S. Steel Building
42d Floor
600 Grant Street
Pittsburgh, Pennsylvania
Attorneys for plaintiff

John E. Wall, Esquire
Dickie, McCamey & Chilcote
U.S. Steel Building
600 Grant Street
Pittsburgh, Pennsylvania
Attorneys for defendant INA

You are hereby notified that the undersigned on behalf of the excess insurer defendants in the above-entitled action will take, for use as authorized by the Federal Rules of Civil Procedure, the depositions of said defendants, and of Bland Payne Ltd., by such of their officers, agents and servants as have knowledge or information pertaining to certain facts relative to the permanent injunction sought by plaintiff, upon oral examination before a qualified person authorized to administer oaths in the United Kingdom of Great Britain and Northern Ireland at the office of Davies, Arnold & Cooper, 4-7 Salisbury Court, London, or at such new offices of said firm as may be available, beginning on July 9, 1979, at 10:00 o'clock A.M. and continuing from day to day during usual business hours.

June 1, 1979

EDMUND K. TRENT
Reed Smith Shaw & McClay
Attorneys for excess insurer defendants

* * * *

[W.D. Pa. Title not printed]

MOTION FOR PROTECTIVE ORDER

Plaintiff Compagnie des Bauxites de Guinee ("CBG") moves this Court for a protective order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, limiting the scope and the timing of depositions noticed by the Excess Insurer Defendants to commence in London, England on July 9, 1979.

Plaintiff asks that the Court enter an order restricting the scope of the said depositions so that questions pertaining to in personam jurisdiction and subject matter jurisdiction would not be considered proper or relevant. This Court has finally ruled on the questions of in personam jurisdiction and subject matter jurisdiction in its denial of the two summary judgment motions filed by the Excess Insurer Defendants, and it should not hear further evidence on the subjects of in personam jurisdiction and subject matter jurisdiction. The Excess Insurer Defendants presented to the Court all facts which they deemed relevant on these issues in the form of affidavits. Between May 20, 1977 and April 19, 1979, they filed 37 affidavits purporting to set forth facts on in personam jurisdiction. During that lengthy period they had every opportunity to present deposition testimony in addition to or in place of the affidavits, but they did not do so. They should not be permitted now to reopen those jurisdictional issues after rulings by the Court in which it found that it does have in personam jurisdiction and subject matter jurisdiction. CBG therefore asks this Court to enter a protective order, in the form attached hereto, precluding the Excess Insurer Defendants from inquiring into facts at the aforementioned depositions which would be relevant only on the issues of in personam and subject matter jurisdiction.

CBG asks further that this Court enter a protective order preventing the aforementioned depositions from taking place until at least one week after the Excess Insurer Defendants shall have answered interrogatories and produced documents requested by Plaintiff CBG in 1976. With respect to these interrogatories and document requests, Plaintiff CBG sets forth the following chronology:

August 9, 1976—CBG served on the Excess Insurer Defendants a request for production of documents and a set of interrogatories. Included in certain of the interrogatories were requests for production of documents used in the preparation of interrogatory answers.

December 4, 1976—Plaintiff received answers from the Excess Insurer Defendants to certain of the interrogatories, objections to others.

January 21, 1977—The Excess Insurer Defendants filed a response to the request for production of documents, containing objections to certain of the requests. No documents were produced.

May 11, 1977—Plaintiff CBG filed a motion to compel production of documents and further answers to interrogatories.

May 20, 1977—The Excess Insurer Defendants filed their first motion for summary judgment challenging the Court's in personam jurisdiction over them.

June 14 & 15, 1978—The Court ruled on Plaintiff's motion to compel production of documents and further answers to interrogatories. It directed that documents be produced and further answers be filed, but stayed the effect of his order until the disposition of the motion for summary judgment on in personam grounds.

April 18 & 19, 1979—The Court found that it has in personam jurisdiction over the Excess Insurer Defendants and subject matter jurisdiction over the case.

May 31-June 1, 1979—The parties, having agreed that the Court had ruled upon the summary judgment motion and that the stay of the production of docmments had been lifted, arranged that the documents should be produced in London on these dates. However, no documents were produced.

The information sought in the interrogatories and requests for documents filed by Plaintiff CBG in 1976 is relevant in the taking of the depositions scheduled to commence on July 9, 1979. That information relates to the terms of the insurance contract between the Excess Insurer Defendants and CBG, the actual notice received by the Excess Insurer Defendants of the crusherhouse accident, the investigation of the loss conducted by the Excess Insurer Defendants, and other matters relating to the merits of the case. Having awaited the interrogatory answers and the production of documents since 1976, Plaintiff CBG now requests that the Court order that the depositions to be taken by the Excess Insurer Defendants not take place until at least one week after the service of interrogatory answers and the production of those documents.

Cloyd R. Mellott
Dale Hershey
Robert W. Doty

Eckert, Seamans, Cherin
& Mellott
Attorneys for Plaintiff

* * * *

[W.D. Pa. Title not printed]

EXCESS INSURER DEFENDANTS' RESPONSE TO PLAINTIFF'S REQUEST FOR DOCUMENTS

The excess insurer defendants will produce for inspection and copying by counsel for plaintiff all the documents in their possession, custody or control described in plaintiff's request as modified by the Court's rulings made June 15, 1978 as reported in the transcript of proceedings on that date, at their respective offices in London (except that those of defendant L'Union Atlantique S.A. d'Assurances Bruxelles will be produced at its office in Brussels) on such dates in July, 1979, as plaintiff shall specify by reasonable notice.

Edmund K. Trent
Reed Smith Shaw & McClay

Attorneys for excess
insurer defendants

June 25, 1979

Joint Appendix

2

DEC 15 1981

ALEXANDER L. STEVAS,
CLERK

No. 81-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX
VOLUME II

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, PA 15230
412-288-3144

Counsel of record
for Cross-petitioners

CLOYD R. MELLOTT
Eckert, Seamans, Cherin & Mellott
42nd Floor
600 Grant Street
Pittsburgh, PA 15219
412-566-6000

Counsel of record
for Cross-respondent

PETITION FOR CERTIORARI FILED
SEPTEMBER 1, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

HERRICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15233

APPENDIX
TABLE OF CONTENTS
VOLUME II

Date Filed	Dkt. Nr.	Description	Page
		Transcript of proceedings June 25, 1979	214a
June 25	w/138	Order	226a
June 25	w/150	Order	227a
Nov. 2	200	Corrections to statements of counsel, Mark F. Bruckmann, Esq.	228a
Nov. 2	201	Corrections to statements of counsel, Mary Ann D'Amato, Esq.	235a
		Transcript of proceedings November 5, 6, 7, 1979	239a
		Plaintiff's case-in-chief Nov. 5, 1979	239a
		Defendants' case-in-chief Nov. 5, 1979	256a
		John Grace: Direct 256a	
		Nov. 6, 1979: Direct 272a, Cross 281a	
		James Roland Blake Fox-Andrews: Direct 289a, Cross 319a	
		Nov. 7, 1979: Redirect 327a, Recross 329a	
1980			
Aug. 5	237	Preliminary statement, findings of fact and conclusion of law	342a
		Permanent injunction order	358a
Aug. 29	243	Notice of Appeal	360a
		COURT OF APPEALS	
1981			
June 10		Opinion of the Court, Aldisert, circuit judge	363a
		Gibbons, circuit judge dissenting in part	381a

[W.D. Pa. Title not printed]

PROCEEDINGS

on Motion For Protective Order and Motion For Continuance Of Injunction Hearing in the above-entitled action, held June 25, 1979, at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons.

[2] (June 25, 1:48 o'clock p.m.)

(In Open Court)

THE COURT: Good afternoon.

* * * *

[3] THE COURT: We have several motions here, so I-

MR. MELLOTT: Yes, we do, your Honor.

* * * *

[13] MR. MELLOTT: The final point on our motion for protective order is that—as I mentioned when I first got up—we've filed interrogatories and requests for production of documents relating to the merits of the case, your Honor, back in August, 1976. We still have none of those documents nor the answers to those interrogatories. Now, part of that delay was with order of court. During that two-year period while their motions for summary judgment -at least one of them was pending, and during part of the period the other one was pending, they were excused from complying with those requests, our requests, [14] and the interrogatories—with that discovery—until the court had ruled on the in personam jurisdiction issue, which occurred on the 19th of April.

We were promised production of these documents, your Honor, when we were last in London taking depositions at the end of May, May 31st, and June 1st.

We were promised the documents. Nothing. We didn't even get one paper, not one sheet. Mr. Doty and I were there from my office and not one bit of paper was produced for us, your Honor. Mr. Trent, just today when he came down, has now given me a copy of a statement, which he is filing with the court today—and which he probably has already given you—which now says, "We're now going to give them to you." And he also tells me they are going to give me some answers to interrogatories.

Your Honor, as far as I'm concerned, we have had a right to see these documents for a long time. They should have been produced, at the very least, at the end of May when we were there. We should have a right to see these documents and to review them prior to the taking of the depositions. Now, I'm not asking that these depositions be postponed, your Honor, except to the extent that we be given the documents and the answers to interrogatories at least a week prior to their start. But I am objecting to the depositions going into any of the jurisdiction issues which have already been decided from the standpoint of this case. But on other issues as to the [15] merits, I have no objection to those depositions going forward provided we get the documents and the answers to the interrogatories a week ahead of time.

Now, finally, most of what I have said in connection with the issues on jurisdiction—

THE COURT: Well, excuse me. Before you go any further now, these were scheduled for July 9th; is that correct?

MR. MELLOTT: That is right, your Honor.

THE COURT: Now, what was your feeling about the timing of these future depositions that you contend would be proper. I mean—

MR. MELLOTT: Well, they can go forward with those, your Honor, if we, by the beginning of the week prior to that—which is by next Monday—if we have the documents that we have requested.

THE COURT: What documents are these?

MR. MELLOTT: Well, they're covered in our request for production which we filed back in August of 1976, your Honor. Do we have a copy of that here, Mr. Doty?

Your Honor, you entered an order in June of 1978 ordering them to produce certain documents. But then they were given the right to withhold producing those until you had ruled on the in personam jurisdiction. So, you [16] already have entered an order on it in June of 1978 when we argued and I had forgotten about that until one of my partners just reminded me. We argued that in June. That was a separate one. That's not the ones that you ordered them to produce in July as well. Those were the ones dealing with how much business they did in this country. But in June of '78, your Honor entered an order, in response to our '76 motion, which directed the production of certain specific documents.

We understand that—

THE COURT: Are there—Excuse me. Are there any contentions made by the excess insurers that these documents are not available or they can't produce them or anything of that type?

MR. MELLOTT: Well, all I know is, your Honor, that what I now see today, which was just given to me before I got up to argue here today, that Mr. Trent has now said that the excess insurer defendants will produce all the documents in their possession, custody or control that are contained in our request as modified by your rulings of June 15, 1978. I don't know, of course—

THE COURT: But when will these be produced? Does it say?

MR. MELLOTT: I don't know, your Honor.

MR. TRENT: If the Court please. The [17] notice states they will be produced at anytime in July on request by plaintiff with reasonable notice. And I have been working out with Mr. Hershey that we could do it before the depositions are taken over there so they would have them. And I understood that was all agreed when we were last here at the hearing in your Honor's chambers in June. We said we would attempt to get them before then, that is, when the depositions on the merits of the case which were scheduled the end of May and the first part of June, were taken. But I found that our clients were not able to get them, or, rather, the solicitors in England couldn't get them altogether then. But they began working on them right away and we should have them -and we will do our best to have in -in advance of the time when the depositions are taken.

THE COURT: In other words, you will have them before the 9th of July?

MR. TRENT: Yes. Or, if we don't have some of them there, we will get them before the depositions are taken.

Now, I think that as far as their requests for documents relating to investigations and things like that, that will cause them no problem because the excess carriers didn't make any investigations. So that they won't have much, if anything, to produce there.

The largest volume of documents to be [18] produced will be those relating to the extent of business done by the excess carriers in Pennsylvania, which they will get ready. And what I had planned to do —I was with the Belgian company in Brussels three days ago and got them to get out their files relating to business done in North America, and said, "Now, go through these and find which ones show coverage in Pennsylvania." They said they would do that. There were about 300 files, so there won't be any trouble to do that. I said that they should prepare a summary listing each one. So, we will have that. And then the files will be made available for counsel for plaintiff to check to see whether the summary is correct; as they certainly have a right to do. And I would hope that we can handle the other documents of the other excess carriers in London in the same fashion. So, we will have—

THE COURT: Excuse me a second. The contention is being made here that they won't have a chance to really examine these documents thoroughly and make preperations for their side of the case on such short notice.

Is that what you are saying?

MR. MELLOTT: That's right, your Honor. I have no idea how many documents will be there. And let me just correct one other thing that Mr. Trent said, and maybe my partner, Mr. Doty, can elaborate on this. But, in any event, we were promised these documents on the 31st of May and the 1st of June—

[19] MR. TRENT: No.

MR. MELLOTT: (continuing)—and they were not produced.

THE COURT: Well, he says, "No."

MR. TRENT: No, they were not promised. We said that we would get them to you as quickly as we could. And we had hoped that we could get them at that time. But I had only gotten into the case. I didn't know what they were and, obviously, I couldn't promise them.

THE COURT: Well, is it possible —Perhaps, maybe we ought to defer these depositions in London if —well, if you don't have the documents which would enable them to be prepared for the depositions.

MR. TRENT: Well, I can see that they should have a right to be prepared. And I hope we can get them for them, and if we cannot get them —

THE COURT: Could you get them, say, by the 2nd of July, something like that?

MR. TRENT: Well, I plan to go over there this Saturday night, the 30th of June, and they will have gotten a lot of them there. And I suggested to Mr. Hershey that if he would come over the 4th or the 5th of July he could start looking at them.

Now, obviously, for some of the clients that have not done any business in Pennsylvania and have made [20] no investigations, there won't be any documents there.

MR. HERSHEY: Your Honor—

MR. MELLOTT: Excuse me?

MR. HERSHEY: All right.

MR. MELLOTT: Your Honor, he's talking about the wrong request. We are not asking for documents relating to their doing business now. They failed to do that over a period of some nine or ten months and sanctions have been entered for that. And it's our position there, your

Honor, that there is no further issue in this case on in personam jurisdiction. It has been decided by this case in response to their motion for summary judgment and in response to several hearings.

The documents we're asking for, and the documents covered by our request and your Honor's order of June, 1978, relate to terms of the insurance contract between the excess insurer defendants and CBG; the actual notice received by the excess insurer defendants of the crusher house accident; the investigation of the loss conducted by the excess insurer defendants; and other matters relating to the merits of the claim under the policy. Not the type of thing he's talking about. Those are the things they refused to produce for some eight or ten months, your Honor. It's these other documents we now need. We want to try to get into the interrogation on the merits.

THE COURT: How much time do you need to review these documents before you would feel comfortable at [21] the depositions?

MR. MELLOTT: Well, your Honor, I don't know how many documents they will produce. We asked in our motion for at least a week. And so, I'm just saying that they ought to be available by the 2nd of July as a minimum. But it sounds to me like he's going after the wrong documents right now.

THE COURT: All right. Just a minute now. Mr. Trent, go ahead.

MR. TRENT: Yes. Let us take them in two separate groups. The first of those that Mr. Mellott has just mentioned, I would think probably—although I have not seen them but from what I have been told, the documents from each of the companies would not be more than two dozen at the most. He could look at them in half an hour.

So that I'm sure we can satisfy him on that in sufficient time for him to be prepared for the depositions.

Now, the other documents, those that relate to the business done with Pennsylvania risks, should be a lot longer, and I will have to find out about those. And if they are in detail, then I would suggest that we proceed with the depositions and if he needs more time to re-examine the witness or something, we could do that. I don't think he will because documents are documents and what they show you can't contradict.

* * * *

[24] Now, as far as the matter of the sanctions goes, he says because we didn't produce documents that, therefore, the jurisdiction is taken against us. We have now offered to produce those documents, and we intend to do so. I think there was a bit of a misunderstanding on the part of New York counsel, Mr. Bruckmann, who seemed to—from my reading of [25] the file—rely a great deal on the fact that these documents that dealt with the precise place where the insurance risks were, were in the hands of brokers in London and the defendants tried to get them and couldn't.

Now, the only obligation under the rules relating to discovery is for us to produce the documents we have in our files or which are under our control. If somebody is our agent, obviously we have to produce what he has and we can order him to do it. These brokers were not our agents. And although we asked them to produce the stuff, they just said, "No. It's too much work." So, I maintain that in the past we have completely complied with the orders to produce all those things.

The only thing is, there are, apparently, a lot of files there which, if you went through them all, might show some risks in Pennsylvania that were covered. And those have not been investigated. Whether they show that or not, I don't know. But that is what we are attempting to do now and what I think I have done with the company in Brussels. And that will be covered, I'm sure, to Mr. Mellott's satisfaction.

But at the hearing in August, if we have complied with your Honor's orders to produce all the documents there would be no occasion for your Honor to impose sanctions upon us. And until the record is made in that hearing, there can be no finding that there was jurisdiction.

* * * *

[33] And as far as the personal jurisdiction goes with respect to the depositions we take in England, as long as we're going to take the witnesses there, we might as well ask them all the questions we want to ask. And then if at the hearing Mr. Mellott should convince you that those things were not proper, then that gets objected to and the objection is sustained when it's read into the record. But we have to make a record so that if your Honor says we can't go into such and such a point, I would have to make an offer of proof on the record as to what I would prove on that point.

THE COURT: Why, sure.

MR. TRENT: (continuing) —So that's [34] going to take just as much time as getting it on the record out of the witness's mouth.

And I assure your Honor we're going to do this with the greatest of expedition and get it done. And I think -

THE COURT: But you see, it's just not fair, for example, when you—not you, personally but your clients and predecessors refused to get information that was requested —

MR. TRENT: I'm not sufficiently familiar with the record to know whether they actually did refuse. Going over it, it looked to me that the principal point raised by Mr. Bruckmann was that all this evidence was not available in the defendants' files and they had to get it from the brokers. Now, I don't think they had to get it from the brokers. They could have very simply said to Mr. Mellott, "Here. You come and look at our files," and that would have done it. And that is what we're offering to do.

THE COURT: The problem is that they didn't do this. That's the problem. They were less than forthcoming, as I remember it.

MR. TRENT: Well, I think it was a little bit confusing. They did not refuse to do that. They just said, "Well, it's going to take you as much time as it will us." But now what I'm having done is to have them go through the files and actually find out what it is and whether we can't get it [35] and get it quickly. And I have found with the company in Brussels that we can do that.

* * * *

[38] THE COURT: Well, it seems to me that the excess insurers have had plenty of time to get all of the information and evidence that they need after four years. It seems to me that just to keep this thing going like it's going, and to use all sorts of devices, apparently, which are legitimate, to try to escape jurisdiction at this late date is sort of unseemly, it seems to me, in the light of the circumstances.

So, I'm going to sign both of these orders. And I will read the first one:

"AND NOW to-wit this 25th day of June, 1979, upon consideration of Plaintiff's Motion for a Protective Order, and after hearing the arguments of counsel, it is hereby ORDERED that the issues of in personam jurisdiction and subject matter jurisdiction, having been determined by this Court in favor of the Plaintiff and against the Insurer Defendants after extensive briefing, oral argument and the presentation of evidence, shall not be the subject of further discovery, testimony or evidence in this case, and it is [39] further ORDERED that the depositions noticed by the Excess Insurer Defendants to commence in London on July 9, 1979, shall not commence until one week following the service of interrogatory answers and the production of documents by the Excess Insurer Defendants as ordered by this Court on June 14 and 15, 1978."

I am going to sign this order.

MR. TRENT: If the Court please. On the basis of that order, I will formally make an offer now to produce all these documents in London on Monday, July 2nd.

THE COURT: All right.

Now, the next order I'm going to sign is as follows:

"AND NOW, this 25th day of June, 1979, upon consideration of the Plaintiff's motion for continuance of the hearing on permanent injunction, and after hearing the arguments of counsel for all parties, it is hereby ORDERED that:

"1. The hearing on the permanent injunction now scheduled for August 8, 9, and 10, 1979, shall be continued until a date, to be specified by further order of Court, following the determination by the United States Court of Appeals for the Third Circuit of the appeal of this Court's preliminary injunction order dated April 19, 1979.

[40] "2. The subject matter of the hearing on the permanent injunction shall be whether a permanent injunction should issue directing the Excess Insurer Defendants to desist from prosecuting the suit which they have filed against the Plaintiff herein in London. At that hearing, the Court will not receive further evidence on the questions of the Court's in personam jurisdiction over the Excess Insurer Defendants or subject matter jurisdiction over this controversy, those issues having been determined in this Court's ruling of April 19, 1979."

* * * *

[W.D. Pa. Title not printed]

ORDER

AND NOW, this 25th day of June, 1979, upon consideration of the Plaintiff's motion for continuance of the hearing on the permanent injunction, and after hearing the arguments of counsel for all parties, it is hereby ORDERED that:

1. The hearing on the permanent injunction now scheduled for August 8, 9, and 10, 1979, shall be continued until a date, to be specified by further order of Court, following the determination by the United States Court of Appeals for the Third Circuit of the appeal of this Court's preliminary injunction order dated April 19, 1979.

2. The subject matter of the hearing on the permanent injunction shall be whether a permanent injunction should issue directing the Excess Insurer Defendants to desist from prosecuting the suit which they have filed against the Plaintiff herein in London. At that hearing, the Court will not receive further evidence on the questions of the Court's in personam jurisdiction over the Excess Insurer Defendants or subject matter jurisdiction over this controversy, those issues having been determined in this Court's ruling of April 19, 1979.

PAUL A. SIMMONS
District Judge

[W.D. Pa. Title not printed]

ORDER

AND NOW to-wit this 25th day of June, 1979, upon consideration of Plaintiff's Motion for a Protective Order, and after hearing the arguments of counsel, it is hereby ORDERED that the issues of in personam jurisdiction and subject matter jurisdiction, having been determined by this Court in favor of the Plaintiff and against the Excess Insurer Defendants after extensive briefing, oral argument and the presentation of evidence, shall not be the subject of further discovery, testimony or evidence in this case, and it is further ORDERED that the depositions noticed by the Excess Insurer Defendants to commence in London on July 9, 1979, shall not commence until one week following the service of interrogatory answers and the production of documents by the Excess Insurer Defendants as ordered by this Court on June 14 and 15, 1978.

PAUL A. SIMMONS
District Judge

* * * *

[W.D. Pa. Title not printed]

CORRECTIONS TO STATEMENTS OF COUNSEL

NOW, November 2, 1979, the excess insurer defendants file the attached affidavits of Mark F. Bruckmann, Esquire, of the law firm of Mendes & Mount, Three Park Avenue, New York, N.Y., who appeared and spoke on their behalf at proceedings in the above-entitled action on December 21, 1978, and April 18, 19 and 23, 1979, and who, after reading the transcripts of said proceedings, has realized that certain statements made by him as reported in said transcripts were not entirely correct, and he has corrected them in said affidavits.

EDMUND K. TRENT
Reed Smith Shaw & McClay
Attorneys for excess insurer
defendants

[W.D. Pa. Title not printed]

CORRECTIONS TO STATEMENTS MADE AT STATUS CONFERENCE DECEMBER 21, 1978

STATE OF NEW YORK } ss:
COUNTY OF NEW YORK }

Before me, the undersigned authority, a notary public in and for said State and County, personally appeared Mark F. Bruckmann, who, being duly sworn according to law, deposes and says that the following statements are true and correct of his own knowledge.

1. In the transcript of the proceedings at a status conference in the above entitled action on December 21, 1978 at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons, on page 15, line 9, I am reported as saying that I agreed with a statement made by opposing counsel, Mr. Mellott, in lines 5-8:

> "If one company comes into Pennsylvania and writes an insurance policy on my life and some one else has a claim and I'm still paying premiums on it, they are doing business in Pennsylvania, and they are subject to suit."

I misunderstood Mr. Mellott's statement. I believed he was referring to a suit by himself on the particular life policy. Those circumstances are sufficient predicates for the exercise of personal jurisdiction over an insurer for that particular policy only. Merely writing one policy and receiving the premium from it does not constitute doing business generally in Pennsylvania by the foreign insurance company, and it would not be subject to suit there by other insureds on other policies.

MARK F. BRUCKMANN

[Jurat not printed]

[W.D. Pa. Title not printed]

CORRECTIONS TO STATEMENTS MADE AT HEARING APRIL 18-19, 1979

State of New York }
County of New York } ss:

Before me, the undersigned authority, a notary public in and for said State and County, personally appeared Mark F. Bruckmann, who, being duly sworn according to law, deposes and says that the following statements are true and correct of his own knowledge.

1. In the transcript of the proceedings on plaintiff's motion for preliminary injunction in the above entitled action on April 18 and 19, 1979 at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons, the Court construed certain statements I had made on December 21, 1978, as constituting an admission that seventeen of the excess insurer defendants did some business in Pennsylvania. The Court said (April 18, 1979, p. 12, lines 13-16):

> "THE COURT: I think it's clear that they admit they did some business in Pennsylvania. It's not clear as to the exact percentage of the one per cent, but it's clear they admitted they did business in Pennsylvania."

My statement on December 18, 1978, was made as a proposal to eliminate the need for the production of the voluminous records in London. This is clear from the language I used (December 21, 1978, p. 15, line 22 through page 16, line 1):

> "An isolated contact here or there, or a small percentage of business, is insufficient under the due process requirements.

> Perhaps, the easiest thing to do is, if we agree that some of these Defendants write one per cent of their premium income, which we have already stated, why do you need the policy? . . ."

Mr. Weis pointed out that this was only a proposal (April 18, 1979, p. 10, lines 22-24):

> "MR. WEIS: That was merely meant to be a proposal. That wasn't meant to be an admission, or to be construed as such. We would object to that."

I never admitted, nor intended to admit, that the excess insurer defendants wrote sufficient insurance for Pennsylvania insureds to constitute doing business in Pennsylvania.

Plaintiff did not accept the proposal, and therefore my conditional statements of the amount of insurance the excess insurer defendants may have written for Pennsylvania insureds cannot constitute an admission.

2. On Page 45, Lines 11-16, I am reported as saying:

> "James Roland Blake Fox-Andrews . . . has been a barrister, I think, in the Queen's counsel for about 15 years . . . . He regularly sits on the court in London, the High Court, with full powers of a judge."

I was incorrect in this. I am informed by the London solicitors for the excess insurer defendants, Messrs. Davies, Arnold & Cooper, that Mr. Fox-Andrews has been Queen's Counsel for 11 years, and whilst he has been a recorder for 8 years, he has not sat on the High Court in London.

3. On Page 46, Lines 23 through Page 47, Line 1, I am reported as saying:

> "The contract is negotiated in London between London principals. The insurers are in London. The Lon-

don broker is a principal. It's a principal-to-principal contract executed in London."

On Page 117, Lines 13 through 16, I am reported as saying:

> "... for a contract that was executed in England between English principals with obligations performed in England for a risk in West Africa."

On Page 206, Lines 17 through 19, I am reported as saying:

> "... because it is our contention that since this was a contract executed between English principals in England, the law of England should apply."

On Page 221, Lines 15 through 19, I am reported as saying:

> "We believe this court should apply English law to the contract ... which was executed in England between two English principals."

On Page 228, Lines 3 through 5, I am reported as saying:

> "The principals to the contract are Bland Payne and the Excess Insurers. It's a principal —the principal contract."

On Page 240, Lines 13 through 16, I am reported as saying:

> "That's what Mr. Fox-Andrews says in his affidavit: it is a contract between English principals. Bland Payne is a principal - not an agent, a principal. It's a principal-to-principal contract."

On Page 241, Lines 11 through 13, I am reported as saying:

> "... as far as English law is concerned, the contract itself is between Bland Payne and the Excess Insurers."

In making these statements I was referring to the obligation to pay the premium. Concerning contracts of insurance, such are negotiated on the London Market between brokers acting as agents on behalf of the insured, or as sub-agents where there is a producing broker, on the one part and underwriters on the other.

* * * *

5. On Page 115, Lines 20 through 24, I am reported as saying:

> "The English action is, strictly speaking, not required. Under English law, the policy has been avoided. As a matter of English law, it is nonexistent at this time."

On Page 116, Lines 13 through 21, I am reported as saying:

> "MR. BRUCKMANN: The insurers have the right, when faced with a non-disclosure, to void the policy ab initio. When they do, it is void and continues to remain void until the insured gets a judicial determination in the High Court of London saying that the insurers had no right to void the policy. Until that's done, the policy is void as a matter of English law.
>
> "As it stands now, there is no insurance policy under English law."

On Page 1?7, Lines 8 through 12, I am reported as saying:

> "MR. BRUCKMANN: Well, your Honor, under the English law they have voided the policy ab initio, and the remedy for the insured is to either bring an

> action in the High Court or appear in the present action to defend it."

On Page 243, Lines 9 through 12, I am reported as saying:

> "The contract in England is not in existence until and unless the Plaintiff in the within action, CBG, either institutes an action in England or appears in the pending action to say that the Excess Insurers were wrong."

These statements are too strong. They are correct only if the assured fails to challenge the avoidance or, if challenged, then the High Court determines that the policy was validly avoided. The onus is on the insurers to show that they validly avoided it.

6. * * * *

On Page 211, Lines 1 through 6, I am reported as saying:

> "Your Honor, what I'm saying is that if we allege fraud, and we are successful, the policy is void. Then we continue with our fraud, and we say because of this fraud our clients have been damaged and we seek to collect monies. Under that type of sequence, by doing that, we waive our objection to personal jurisdiction."

These statements are too strong because the authorities are not in agreement on the point. I should have said that if we had requested affirmative relief we might have waived our objection to personal jurisdiction.

MARK F. BRUCKMANN

[Jurat not printed]

* * * *

[W.D. Pa. Title not printed]

CORRECTIONS TO STATEMENTS OF COUNSEL

NOW, November 2, 1979, the excess insurer defendants file the attached affidavits of Mary Ann D'Amato, Esquire, of the law firm of Mendes & Mount, Three Park Avenue, New York, N.Y., who appeared and spoke on their behalf at proceedings in the above-entitled action on July 27, 1978, and February 8, 1979, and who, after reading the transcripts of said proceedings has realized that certain statements made by her as reported in said transcripts were not entirely correct, and she has corrected them in said affidavits

EDMUND K. TRENT
Reed Smith Shaw & McClay
Attorneys for excess insurer
defendants

[W.D. Pa. Title not printed]

CORRECTIONS TO STATEMENTS MADE AT ARGUMENT JULY 27, 1978

State of New York } ss:
County of New York }

Before me, the undersigned authority, a notary public in and for said State and County, personally appeared Mary Ann D'Amato, who, being duly sworn according to law, deposes and says that the following statements are true and correct of her own knowledge:

1. In the transcript of proceedings of the argument in the above entitled action on July 27, 1978 at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons on Page 18, lines 18-19 and 25, and on Page 29, lines 1-2, I am reported as saying:

> "CBG gave the money to Marsh & McLennan in Pittsburgh .... For the benefit of the insured, because if they (Marsh & McLennan) didn't pay the premium on behalf of the insured, there would not have been any coverage in effect."

This statement is incorrect. When the Underwriters initialed the placing slip, the coverage became effective whether or not the premium had been paid.

2. On Page 19, lines 11-13, I am reported as saying:

> "I believe in that instance, your Honor, the insurers would have had a cause of action against Marsh & McLennan, that the coverage would have been in effect, to answer your questions directly."

I misspoke. I meant that the insurers would have a cause of action against Bland Payne and that the coverage would have been in effect. If Marsh & McLennan did not pay Bland Payne, Bland Payne would have a cause of action against Marsh & McLennan and if Marsh & McLennan were insolvent, against plaintiff. Thus, plaintiff might have to pay twice.

3. On Page 33, line 25, through Page 34, line 4, I am reported as saying:

> "Well, your Honor, they [the excess insurer defendants] could anticipate that [the negotiations with the insured's home office] would be anywhere in the United States or in the world, for that matter."

By the word "that" I was referring to negotiations between the insurance company and the party which sustained the loss, which was the subject of the Court's question to me. Concerning the place of loss, the excess insurer defendants would have anticipated that such would occur only in Guinea.

MARY ANN D'AMATO

[Jurat not printed]

[W.D. Pa. Title not printed]

CORRECTIONS TO STATEMENTS MADE AT ARGUMENT FEBRUARY 8, 1979

Before me, the undersigned authority, a notary public in and for said State and County, personally appeared Mary Ann D'Amato, who, being duly sworn according to law, desoses and says that the following statements are true and correct to her own knowledge:

1. In the transcript of the proceedings of arguments on motions in the above entitled action on February 8, 1979 at Pittsburgh, Pennsylvania, before the Honorable Paul A. Simmons, on Page 9, lines 1-2, I am reported as saying:

> "They are suing on an insurance contract which was placed wholely within Pennsylvania."

This statement requires clarification. I was reciting the plaintiff's contention and arguing that such was an activity in Pennsylvania which, together with plaintiff's other activities in that state, required it to register to do business.

* * * *

3. On Page 62, lines 24-25, I am reported as saying:

> ". . . in fact, the insurance, which is the subject of the law suit, was procured in Pennsylvania."

I was again reciting plaintiff's contention and arguing that this required plaintiff to register to do business in Pennsylvania. I meant that the insurance which is the subject of the law suit was, according to plaintiff's contentions, obtained from its broker and agent, Marsh & McLennan, in Pennsylvania. The insurance was actually procured in London by the broker Bland Welch, a subagent of plaintiff.

MARY ANN D'AMATO

[Jurat not printed]

* * * *

November 5, 1979
Pittsburgh, Pennsylvania

[W.D. Pa. Title not printed]

BEFORE: HONORABLE PAUL A. SIMMONS, D.J.

TRANSCRIPT OF PERMANENT INJUNCTION PROCEEDINGS

[3] November 5, 1979
Pittsburgh, Pennsylvania

MR. HERSHEY: Your Honor, this is the time which the court has set for argument and presentation of evidence on the permanent injunction issue.

* * * *

[17] THE COURT:

* * * *

Do you want to call your witnesses?

MR. HERSHEY: Well, Your Honor, the first evidence [18] that I would like to offer is the set of London suit papers.

These papers were offered as PX-1.

THE COURT: Have they been introduced before?

MR. HERSHEY: Yes. They were introduced before.

Under Rule 65 (a)(2) the evidence that was received at the preliminary hearing itself automatically is a part of the record on the permanent injunction hearing —

THE COURT: Yes.

MR. HERSHEY: I do want to make particular reference to points in these papers and I have subdivided the exhibit to highlight various different papers that are included in these London suit papers.

THE COURT: Now, was this marked as an exhibit?

What was the number again?

MR. HERSHEY: PX-1.

Well, it was PX-1 at the preliminary injunction hearing, but I am going to divide PX-1 down into PX-1-A to PX-1-H.

* * * *

[19] THE COURT: Do I understand there is an objection to PX-1?

MR. TRENT: No, no.

* * * *

[45] MR. HERSHEY: Your Honor, in light of that discussion, I would like, as a first order of business, to make note on the record of the court's order of June 25, 1979, in which it found that it has in personam jurisdiction over the parties, subject matter jurisdiction over the controversy.

Now, turning to PX-1A, I undertand there is no objection to the introduction of PX-1A, and I move it into evidence.

MR. TRENT: I object to it as irrelevant because under the law it is perfectly proper for parties in suit to file a suit even if it is duplicative in another court. Mr. Hershey's case dealt with federal courts, but where [46] it is federal court and state court, or court of a foreign jurisdiction, it is improper. We have objection to the admission of PX-1A through H.

THE COURT: What is the relevancy of it?

MR. HERSHEY: We are here on a question of permanent injunction against the excess insurer defendants in prosecuting an English suit. These are the court papers in the English suit. That is PX-1A through PX-1H.

Exhibit 1, as introduced at the preliminary injunction hearing, includes A through H.

But looking at PX-1A through H, I moved it into evidence, but you didn't rule.

THE COURT: It's part of the record. It's all contained in your Exhibit 1. Isn't that true?

MR. HERSHEY: Yes. So I will not have to move into evidence the matters that are already of record.

* * * *

[50] MR. HERSHEY: Well, Your Honor, it is all in evidence, but I am offering this not for the truth of all the statements but to show that these allegations are made in the English court.

For example, we are not admitting that there were material non-disclosures. I just want the court to be aware that just as the excess insurer defendants are defending on the ground of material non-disclosure in this case that is the heart of the case in England.

We are not admitting the truth of these statements. We are offering this evidence to show what the English case is all about so we can see the parallel nature of the two cases.

* * * *

[53] The D.A.M.1, to which Mr. McIntosh refers, we have marked as PX-1E. That is a copy of the placing slip.

Looking at PX-1E, the court can see what a placing slip looks like. This slip, Mr. McIntosh says, was initialed by the excess insurers.

In the lower right-hand corner, though it is faint, there is a stamp of the Insurance Corporation of Ireland. I think that's it there, your Honor, with the figure of 10%, and certain initials after the stamp of the Insurance Corporation of Ireland.

The form on this placing slip is shown to be [54] "as underlying as far as applicable," that is, the coverage is designated as "all risks, physical loss, or damage as original."

Then the word "form" "as underlying as far as applicable."

We know from the Statement of Claim that was read earlier as PX-1C, that is a reference to the INA policy because the INA policy is the underlying policy.

MR. TRENT: If the court please, just as a remark that Mr. Hershey's statement in reference to INA policy, the INA policy had not been written at this time. So what was intended was a reference to the policy which would be written assuming it would contain all the customary conditions on the London Insurance Market and follow the material damage insurance policy as well.

MR. HERSHEY: Your Honor, Mr. Trent's objection is really a statement of evidence. All I am doing is stating what has already gone into evidence.

* * * *

[55] THE COURT: Do you agree this excess coverage was taken out prior to the underlying insurance?

MR. HERSHEY: The evidence indicates, Your Honor, that when the placing slip was initialed by the excess insurers, the INA policy had not been drafted but Marsh & McLennan was arranging with INA to provide the underlying coverage.

It was clear at that point that INA would provide the underlying layer of coverage, but the INA policy itself had not yet been drafted.

I don't think this is really a matter of dispute because in PX-1C, which is the Statement of Claim of the excess insurers in England, paragraph 3, they say, "The underlying policy of insurance was issued by the Insurance Company of North America."

So they acknowledge that INA was the carrier, and in their underlying as far as applicable they mean to refer to the INA policy.

* * * *

[56] MR. HERSHEY: * * * *. Next looking at PX-1F, which is the second exhibit to the affidavit of David McIntosh, this exhibit is the amended answer filed in this court, and if the court would refer again to paragraphs 27 and 28 of that amended answer, I would like particularly to note the next to the last sentence in paragraph 27 where the excess insurers in their sixth defense say, "For this reason it is averred that the damage in question occurred prior to a date on which the policy and cover note in question were issued, and the alleged loss is not covered under the said policy and cover note."

They are referring to a loss which allegedly occurred involving the pan feeders and crusher house which they allege could have been sustained prior to February 12, 1974.

[57] Then in paragraph 28 they go on in their sixth defense saying "By way of further defense, these defendants averred that the said prior damage to the property in question was not revealed by the plaintiff to these defendants prior to or at the time of the issuance of the said policy number 71HF1195 and cover note," that is the policy number of the INA policy, "all of which is contrary to the terms and conditions of the said policy and cover note and all of which serves to eliminate coverage for the alleged loss."

So the excess insurers are defending themselves on the ground that coverage was eliminated due to a failure to make a disclosure to them about matters that occurred prior to their underwriting.

In the Statement of Claim in the English case, the court will recall that they were making the same claim. They were saying that they were not told certain facts, and that they were entitled, therefore, to avoid the policy.

It is our position that the same contract, the issue of material non-disclosure and the same parties are involved in both the English action and the action before this court, as shown by the very pleadings or court papers which were presented to the English court.

* * * *

[62] MR. HERSHEY: At the preliminary injunction hearing, the Plaintiff offered the exhibits through PX-5.

So in the numbering of exhibits here, I would like to skip to PX-6 which is Policy No. 71HF1195 issued by the Insurance Company of North America, Philadelphia, Pennsylvania to Compagnie des Bauxites.

THE COURT: Is there any objection?

MR. TRENT: I will admit it is a copy of the policy.

I point out that it bears the date April 1, 1974.

I would like to ask how it is relevant?

THE COURT: All right.

MR. HERSHEY: Well, Your Honor, this policy is the policy which was referred to in the exhibit already presented in a policy which was adopted by the Excess Insurers.

MR. TRENT: We don't admit it was adopted, but I see that is your contention.

THE COURT: All right.

MR. TRENT: I would object to it unless it is covered by testimony showing what the customary practices and the procedures of the London Insurance [63] Market were.

THE COURT: Do you intend to do this, connect this up with evidence, connect this matter up?

MR. HERSHEY: Well, Your Honor, I think the evidence regarding practices is already in the placing slips. The placing slips refer to this as an underlying document as far as applicable.

The Statement of Claim says the underlying policy is this policy. So it does not require any testimony here. There is no ambiguity that requires testimony.

MR. TRENT: Well, yes, because the policy wasn't in existence when the placing slip was initialed.

MR. HERSHEY: Well, there is no evidence to that effect other than Mr. Trent's statement.

MR. TRENT: Well —

THE COURT: You admit that?

MR. TRENT: It had not been drawn yet.

MR. HERSHEY: I think there is no dispute, Your Honor, that this policy is the policy to which words underlying as far as applicable refers.

MR. TRENT: They were intended to refer to the policy, a policy to be issued by Insurance Company of North America, which would comply with the customs [64] and practices of the London Insurance Market and not to one which didn't.

This departs from it to a certain extent.

THE COURT: You are going to have to present evidence to that effect?

MR. TRENT: Yes.

MR. HERSHEY: Your Honor, I offer this and move its admission into evidence, to show that this policy was issued in Pennsylvania and was delivered to Compagnie des Bauxites in care of Marsh and McLennan at One Oliver Plaza, Pittsburgh, Pennsylvania and to show that this is the underlying policy to which the Excess Insurers referred in their placing slip.

MR. TRENT: The latter thing is what I say is not entirely correct.

MR. HERSHEY: I move its admission, for purposes of this hearing.

THE COURT: We will admit it for what it is worth.

Are you going to check up on this?

O.K. on that.

It is in fact a policy on which the placing slip had reference to?

MR. HERSHEY: Yes.

[65] Well, Your Honor, I think I have already shown that.

The affidavit of Mr. McIntosh, for example, states that it is the underlying policy and that the policy was 71HF1195 which is this policy even though the final wording was not agreed upon in certain respects until a later time.

This is the policy that Mr. McIntosh has acknowledged to be the one referred to in the placing slip.

MR. TRENT: I have another point showing that the wording of this Insurance Company of North America policy is not what constituted a contract of the Excess Insurers.

It appears from the cover note which was attached to the Complaint, which says "Wording as underlying as far as possible to be agreed by underwriters"—and the underwriters never agreed to the wording of the Insurance Company of North America policy.

MR. HERSHEY: Well, Your Honor, as Mr. Trent well knows from evidence that both he and I heard in England this summer, the binding language is on the placing slip, not on the cover note.

The cover note says, as far as applicable; and Defendant Excess Insurers have taken the position [66] throughout this case that the underlying policy was the Insurance Company of North America policy. It appears in their Answer.

I can't imagine this as a contested point, that this policy, Plaintiff's Exhibit 6, is the underlying policy to which the placing slip refers.

If one is to locate the contract documents that make up this contract, one looks to the placing slip and to the document to which the placing slip refers. That is the underlying policy.

MR. TRENT: You can't say that part of the contract was in a document that was not in existence when the contract was signed; otherwise, they could have just written anything in it.

While it is true that the placing slip when that is signed and delivered constitutes a contract, that is made in light of all of the customs and practices of the London Insurance Market, and by the cover note the Plaintiff admitted that the wording was to be agreed and would be furnished later —the wording was to be agreed upon later.

• • • •

[73] MR. HERSHEY: I move for the admission of Plaintiff's Exhibit 6.

THE COURT: Any objection?

MR. TRENT: Well, I object if it is offered for the purpose of showing that it is part of the contract that the Excess Insurers made because it does not show that. I admit this is the correct policy and that the policy was issued by Insurance Company of North America to the Plaintiff here.

How it differed, I am just not sure. I don't know if there is evidence of that.

But you are stating it was sent to Marsh and [74] McLennan, if you tell me that I will take your word for it.

THE COURT: Well, all right.

MR. HERSHEY: It so states on the first page of the exhibit.

THE COURT: All right.

We will admit it pro forma. We will wait till all of the testimony is in and evidence is in in the case before we make a final ruling.

* * * *

[75] MR. HERSHEY: I will read now admissions that deal with the question of whether the two cases, the case in England and the case in the United States, are parallel cases.

There are other admissions that deal with the forum non-conveniens points. I will read those at some other point in response to Mr. Trent's evidence.

(Off the record.)

MR. HERSHEY: First I would like to read Request No. 1 and the response to No. 1.

The Excess Insurers are asked to admit: "This case has been pending in the United States District Court for the Western District of Pennsylvania since December 11, 1975."

The response is: "The Excess Insurer Defendants admit that Plaintiff's Complaint was filed December 11, 1975, that the writ of summons was issued on said date and that the summons and complaint were purportedly served on the Excess Insurer Defendants in the manner and on the dates set forth in the Return of Service, subject to the qualification that any delay in bringing the case to trial was not caused by Defendants."

* * * *

[76] Then the Excess Insurers are asked to admit this statement, "The English action was commenced on March 22, 1979."

"Admitted" is the response.

* * * *

MR. HERSHEY: * * * * Paragraph 17.

"The same parties are involved in the English action and Count II of the Complaint in the American action. Those parties are Compagnie des Bauxites de Guinea (CBG) and the Excess Insurers."

And the response is "Admitted."

THE COURT: All right.

MR. HERSHEY: Paragraph 18.

THE COURT: All right.

MR. HERSHEY: "The same excess insurance contract is involved in the American action and the English action."

The response is "Admitted."

THE COURT: All right.

MR. HERSHEY: Paragraph 19 of the request for admissions.

THE COURT: All right.

MR. HERSHEY: "In both the American action and the English action, the Excess Insurers take the position that the excess insurance contract is unenforceable because certain facts were not disclosed to the Excess Insurers before they entered the contract. In the English action the Excess Insurers thus seek a 'declaration that they are entitled to [78] avoid the Contract of Insurance' (Statement of Claim, p.2); in the American action the Excess Insurers defend on the ground that coverage is eliminated because alleged facts were not revealed (Amended Answer, §28)."

The response of the Excess Insurer Defendants to that request is as follows.

"The excess insurer defendants admit that one of the positions they take in the American action is that plaintiff cannot recover on the claim it is making in the American action on the contract of excess business interruption insurance because of, inter alia, the failure of plaintiff, or its agent Marsh & McLennan, or its subagent Bland Welch & Co. Ltd., to disclose to the excess insurer defendants, before they entered into the contract of insurance, certain facts material to the risk which might not be sufficient to entitle them to avoid their contract ab initio; whereas their position and contention in the English action is that they are entitled to rescind the insurance contract ab initio because plaintiff, or its agent Marsh & McLennan, or its subagent Bland Welch, failed to disclose to the excess insurer defendants certain facts material to the risk which would be sufficient to entitle them to avoid [79] the contract ab initio."

* * * *

[101(2)] MR. MELLOTT: I would ask Mr. Trent whether he will stipulate that the excess insurer defendants, with the exception of Home Insurance Company and Hanover Insurance Company, are companies incorporated in foreign countries.

MR. TRENT: Mr. Hershey and I have written this out and have shown what each of these excess insurers is. I would present that.

THE COURT: Do you want to make that as a defendant's exhibit?

MR. TRENT: Yes.

THE COURT: It is a correct document and [101(3)] represents what it purports to represent? That is, excess insurer defendant's exhibit C.

MR. HERSHEY: We can agree that the country of incorporation as shown on this exhibit is accurate for each of the companies listed, and that is the only fact on this exhibit that is relevant for venue purposes, except for the fact that it is admitted here that both Hanover and Home are licensed to do business in Pennsylvania, and that fact is also relevant for venue purposes.

THE COURT: Is that set forth on the exhibit?

MR. HERSHEY: Yes, it is.

MR. TRENT: Yes.

MR. HERSHEY: That we agree to. The remainder of the exhibit we cannot agree to without checking further.

MR. TRENT: I would certainly, if they wish to check it further, and if there are any mistakes on here, correct them. But I think it is correct.

MR. HERSHEY: We would agree to the country of incorporation information and to the fact that Hanover Insurance Company and Home Insurance Company are licensed to do business in Pennsylvania.

THE COURT: We will admit exhibit C provisionally and see how it connects up when Mr. Trent puts his case in.

* * * *

[101(4)] MR. HERSHEY: All right. The next paragraph that I would read from the admissions is paragraph 20 as follows in request for admissions, "Plaintiff's exhibit 1 accepted into evidence at the hearing of April 18, 1979, contains the court papers of the English action. The "Statement of Claim," that is the complaint in the English action, "has not been amended since that date. No further affidavits have been filed in the English action since that date."

THE COURT: Which date?

MR. HERSHEY: April 18, 1979. "No further affidavits have been filed in the English action since that date, and the English action has not been withdrawn."

"Answer: Admitted subject to the qualification that the reason why no further events have taken place in the English action is because plaintiff in the American action obtained on April 19, 1979, in said American action a preliminary injunction forbidding the excess insurer defendants from further prosecuting the English action."

Paragraph 21 of the request for admissions is as follows: "CBG does not trade or reside within the jurisdiction of English courts," and the request makes reference to the affidavit of D. A. McIntosh filed in the English action at paragraph 8(b) as a source for that [101(5)] statement. "The excess insurers do not allege that CBG derives profits from —

THE COURT: Was that admitted or not?

MR. HERSHEY: It is admitted, Your Honor. "CBG does not trade or reside within the jurisdiction of English courts."

THE COURT: Admitted?

MR. HERSHEY: Admitted. "Excess insurers do not allege that CBG derives profits out of England."

THE COURT: That part of 21, also?

MR. HERSHEY: That part of 21, as well. "Nonetheless, the excess insurers have induced the English court to assume long-arm jurisdiction over CBG. The English court authorized the excess insurers to serve CBG with process at its statutory office in Dover, Delaware."

I should read the full admission on paragraph 21. "The excess insurer defendants admit that plaintiff does not now trade or reside within the jurisdiction of English courts, subject to the qualification that in 1974, acting through its agent, Bland Welch, it secured business interruption insurance from defendants."

MR. TRENT: Secured business interruption insurance in London.

MR. HERSHEY: Yes. "Secured business interruption insurance in London from defendants. The [101(6)] excess insurer defendants admit the second sentence of request 21."

That second sentence had to do with the derivation of profit.

"The excess insurers do not allege that CBG derives profits out of England."

That is admitted.

They admit the third sentence, except for the word "induce" for which they would substitute "request." That is, they say they requested the English court to exercise its long-arm jurisdiction and admit that the English court authorized long arm service over CBG in Delaware.

Now, of course, Your Honor, we would challenge the statement in this admission that CBG entered England to obtain this insurance policy and that it was done through CBG agents there. But there is no allegation that CBG does business in England in the sense of selling bauxite or otherwise engaging in trade in the United Kingdom.

Your Honor, as a last admission, I would like to read from paragraph 13 of the motion for dismissal on the grounds of forum non-conveniens. That paragraph says, "Among the defenses raised by the excess insurer defendants in their amended answer was the failure of Bland Payne representatives to disclose to defendant's [101(7)] underwriters all facts material to the risk in breach of an implied term of the insurance contract."

So the excess insurers admit that their defense in the American case in addition to otherwise defending themselves —

THE COURT: Which motion?

MR. HERSHEY: The motion for dismissal on forum non-conveniens. They admit that.

THE COURT: You are using that as an admission to your injunction?

MR. HERSHEY: Yes.

THE COURT: All right.

MR. HERSHEY: They admit that they are raising in this court the defense of material non-disclosure, which is the same issue that they have raised in the English court involving the same contract and the same parties that are before the court here.

And on the basis of the evidence in plaintiff's exhibit 1, and the admissions that I have read from, their responses to our request for admissions, and the admissions in their motion, I think this court has full authority to enjoin the excess insurers from proceeding further with their action in England or from filing any other similar actions that duplicate the issues they raised before this court.

[101(8)] That concludes the evidence that we would present on the subject of the permanent injunction.

* * * *

[103] THE COURT: All right, Mr. Trent, do you want to introduce your case and put your witnesses on?

MR. TRENT: No.

I guess I will start with a witness now.

THE COURT: All right. You may start with your witness.

JOHN GRACE

Called as a witness by and on behalf of the Defendants, was first duly sworn, was examined and testified as follows:

* * * *

[113] DIRECT EXAMINATION

BY MR. TRENT:

Q Would you state your full name, please.

A John Grace.

Q G-R-A-C-E?

A Yes.

Q Where do you live?

MR. HERSHEY: I ask that the witness be sworn.

[114] THE COURT: He has been sworn.

MR. HERSHEY: All right, thank you.

A 36 The Avenue, London 11.

Q By whom are you employed?

A Insurance Corporation of Ireland.

Q Where is that company incorporated?

A Dublin, Ireland.

Q Where is its principal office?

A In Dublin, in Ireland.

Q Does it have an office in London?

A It does. It has two, one for marine insurance in Lloyd's and one office at 37-39 Lyme Street.

THE COURT: Your office is in Dublin?

THE WITNESS: The head office is in Dublin, Your Honor, but my office is in London.

THE COURT: All right.

BY MR. TRENT:

Q What is your position with Insurance Corporation of Ireland?

A Fire manager and London manager.

Q When did you enter the insurance business?

A In 1955.

• • • •

[115] Q What have been your duties and activities and experience since you joined the Insurance Corporation of Ireland?

A Generally, handling their accounts throughout the world —although initially we wrote property damage only worldwide, excluding United States and Canada.

We subsequently moved into the accident [116] field in a small way.

In November of 1976 we commenced underwriting American and Canadian accounts.

Q All right.

Would you just tell us again what the field was that you were in in 1973 and 1974 at the time of the event involved in this case?

A Well, as lead underwriting writer —and in fact in my office we have 13 underwriters —I would do —

THE COURT: Thirteen?

THE WITNESS: Yes.

A And we do specialize in writing big risk accounts which necessitate the placement that we have involved with Bauxites de Guinea, big risk accounts on layer or an excess basis.

Q All right.

In connection with this type of business, are you familiar with the customs and practices of the London insurance market?

A I am.

Can I go so far as to my own field?

Can I go as far as my own field is concerned?

[117] Q Sure.

A I am not concerned with marine, aviation or peculiar accident business as far as that is concerned.

Q All right.

Now I will restrict all these questions to that field.

A All right.

Q So I don't need to repeat it every time.

A All right.

Q In that field since you have been with Insurance Corporation of Ireland —

THE COURT: Just a minute.

"That field" being what field?

MR. TRENT: The field he just described as the one he was connected with.

THE WITNESS: Yes, big risk accounts, excess or layer basis.

THE COURT: Layer basis?

THE WITNESS: Yes.

A In fact the risk that we are involved with today was a risk written on a layer basis.

* * * *

[120] Q Will you just tell us the best of your knowledge as to whether brokers are experienced and know

what the customs and practices in the London Insurance Market are?

A Yes.

The London market has grown in stature since well over the last 300 years and the brokers that we are talking about here at that time Bland Welch were among the most professional and experienced in placing this type of insurance. They were very well known for it.

Q Can you tell us just in general what the business of the London office of the Insurance Corporation of Ireland has been?

A It is called —

THE COURT: Just a second. I don't understand that question.

MR. TRENT: I just want a general description of what the business is that he has been involved in.

THE COURT: He has already told us that he is in the business of layered insurance.

[121] BY MR. TRENT:

Q Have you covered that?

A Yes, but to put it broadly, the office is called a non-marine office. It handles property damage business, business interruption and consequential losses which are now more or less intermingled.

And also a very limited amount —to a very limited extent short-term with no liability.

Q What is meant by the term "fire business"?

A Covering perils such as fire, storm, tempest, falling aircraft.

Q That is handled in your office?

A Yes.

Q All right.

Now I am still directing my questions to the period 1973 and 1974.

A All right.

Q Which was the time involved in this case.

Can you tell us with respect to the business of the type involved here. Am I correct in calling that "fire business"?

A Yes.

Q With respect to fire business will you tell us how risks are presented and placed to the underwriters?

[122] THE COURT: Just a second.

You mean the business interruption insurance is also under the umbrella of the fire business?

THE WITNESS: Yes, Your Honor.

MR. HERSHEY: Your Honor, I would object to the question. I don't think the practices of placing insurance are relevant either to the question of whether the English suit parallels the suit before the court here or to the issue of forum non-conveniens.

THE COURT: I am going to overrule you pro forma. Listen.

MR. HERSHEY: May I have a standing objection to anything that does not relate to parallelism of the two suits and the convenience of trying the case in one forum rather than in another?

THE COURT: All right.

I will overrule you pro forma.

You may proceed.

MR. TRENT: Yes.

BY MR. TRENT:

Q Now I asked you to tell us how risks are presented and placed in the London insurance market.

[123] A If I could explain, one of the misconceptions about the London market is that it operates on the basis of companies that write perhaps strictly household or motor insurance.

It is always anticipated in London that you write a set type of insurance and you issue a policy for it. In fact in London the method of operating is the broker will come to you with a slip, or sometimes before he reaches the slip stage, he will receive a Telex from his client overseas. He is informed.

It will then be an underwriting job, the job to build in conjunction with the broker a viable risk for instance, which would be covered, which might cover something like an earthquake in Japan.

We could not afford to accept this earthquake risk. We could only cover first policy. There are other sources and ways that I could do it —but it would be rather lengthy and perhaps boring for you.

I think that basically finishes it at that point.

Q In other words, are you saying that these types of risks that you deal in are specialty contracts for each insured?

[124] A It is business over the desk as opposed to the normal type of business that takes place in all other parts of the world.

A broker sits with the underwriter for the risk and physically underwrites.

This is in fact a type of operation that New York people are trying to build. They are trying to build this type of operation.

Q People in New York are trying to build this type, the type that you have in London?

A Yes.

Q This business is transacted over a desk?

THE COURT: Now, don't repeat the testimony now, Mr. Trent.

MR. TRENT: All right, all right.

THE COURT: Just ask questions.

MR. TRENT: All right, all right.

BY MR. TRENT:

Q Does the insurer in London request a broker to obtain business for insurance?

A No.

* * * *

[127] BY MR. TRENT:

Q Now is there any difference between whether a broker tells you things without being asked or answers questions; what is the practice in that respect?

A I would say that 70 percent of the London brokers will volunteer the information required, and we know the ones that do not volunteer and therefore we ask the questions.

Q Which type was Bland Welch?

A Bland Welch was one that always gave all of the information that was available.

Q That is without asking?

A Yes.

Q Would you frequently see the broker more than once before you arranged the terms of risk?

A Yes.

On many big risks it is customary to meet four to five separate times, separate meetings where the risk is being gradually built up.

We may for example say to the broker that we want such and such a rate. The broker then goes back to his client. The client may say, "I am sorry; that's too much."

We would then think of other ways of [128] getting the client a figure by bringing in deductibles, for instance, or curtailing the number of perils.

Q When the terms are then agreed upon between the underwriter and broker and the underwriter decides to accept the risk, then what happens?

A Then he will place his stamp on the slip, initial it, date it and put his share —

THE COURT: What is "share"?

THE WITNESS: The share he was prepared to accept.

THE COURT: You mean a brokerage commission?

THE WITNESS: No, a share of the total underwriting.

In some cases we wrote ten percent, so therefore we put down "ten percent" or any other range that would be necessary.

A The inception date, if it was on the slip, we would give it a reference number. If the inception was still to be advised, we would mark it to be entered.

Now that means the broker would have to come back to advise us of the inception.

THE COURT: What about this other 90 percent?

Did you correlate that with your ten percent?

[129] THE WITNESS: Yes. The slip would have been shown the rest of the market. They would write their line accordingly, following my line.

THE COURT: Oh, you were lead underwriter?

THE WITNESS: Yes.

BY MR. TRENT:

Q Who would show the slip to the rest of the market?

A The broker.

Q The broker?

A Yes.

Q And after you have put your stamp on the slip and signed it and dated it, do you make a copy of it?

A Yes. We make a copy of everything there when we put an actual signature on the slip.

Yes, we make a copy of it.

Q What happens to the original?

A The original is kept by the broker who then uses it to see other people in the market.

Q Now after the broker has completed the seeing of everyone and has gotten all the underwriters to sign and put their stamp, then what does the broker do?

A He then prepares a cover note listing briefly [130] the details of the risk and premium.

He would then list the companies and their shares so that the insured can look at the security involved to make sure that it is suitable security.

THE COURT: By "security," do you mean the name of it?

THE WITNESS: The underwriters involved, the companies involved.

BY MR. TRENT:

Q Do underwriters have anything to do with the issuance of the cover note?

A No.

Q Do they see the cover note?

A No.

Q Do they authorize the broker to issue the cover note?

A No.

Q Do they give any broker any authority to do anything on their behalf?

A No —other than collect the premium.

They would rely on the broker to collect the premium from the insured.

* * * *

[132] Q Tell us now again about the payment of the premium.

Did you say that the broker paid that?

A The broker will pay the company, yes.

Q And for whom is the broker acting when he pays the company?

A The insured.

MR. HERSHEY: the witness has already answered that question and it is a legal conclusion, Your Honor.

MR. TRENT: He hasn't answered that question. I asked him—

MR. HERSHEY: Yes, he was asked earlier what other things the broker does for the insured.

MR. TRENT: That wasn't the question.

MR. HERSHEY: He testified—

THE COURT: Let me say that my recollection is that the witness testified that he is here —and you can correct me if I am wrong—that the only thing that the broker is authorized to do is collect the premium; is that correct?

THE WITNESS: Yes.

* * * *

[133] Q Are there any occasions when the placing slip has been signed and delivered and the premium has been paid but no policy has been issued?

A Yes.

This happens on many occasions.

• • • •

[134] In fact, in general terms it is normal practice where we have a short period risk of say two, three or four months for the premium to be paid, for the risks to have expired before the policy can be issued.

It is then pointless to issue a policy. We therefore have a system which is called a "time on risk certificate," which is issued in place of the policy; it is certainly understood that this can only be issued if there is no claim.

If claim occurs, then the policy must be issued.

BY MR. TRENT:

Q Who prepares the policy under those circumstances?

A The broker. He will prepare time on risk certificates.

[141] Q Now, did you have anything to do with your [142] company's writing a share of the business interruption insurance for the plaintiff, CBG, in this case in the early part of 1974?

A I did.

Q I show you Defendant's Exhibit JG-1 and ask you to tell us what that is.

A This is the final slip that was prepared with regard to Compagnie Des Bauxites de Guinee, and I signed it toward the end of January of 1974, writing 10% for myself and the rest to somebody else.

MR. HERSHEY: Are the other slips going to be presented to the witness showing how much he wrote initially?

MR. TRENT: That one shows the initial amount. It will be all covered. Don't worry.

THE COURT: Let me see that, please.

BY MR. TRENT:

Q Now, did somebody present the original of that slip to you?

A Yes.

Q I think the date is January 31, 1974?

A Yes.

Q Do you remember who it was?

A No.

Q Can you tell us from whom the person came?

[143] A Came from Bland Payne's International Department, and I saw so many brokers in the workup stage to this final slip, that it could have been Prior, Glynne-Jones, Murray, Gilbert, and even possibly some of the people in the office such as Butt, Titley or Wright. I certainly saw Titley and Wright at a later occasion. It may have been at that time, or with a later slip you are going to present.

Q You mentioned that you had some other meetings relating to this risk?

A Yes, four or five.

Q Tell us what took place on those.

A We gradually built a presentation on the bones of the slip, which is normal practice.

Q Then you put your stamp and initialed the original of this slip?

A Yes.

Q Then you made a copy of it?

A Yes.

Q And the original was given back to the Bland, Payne brokers?

A Yes. At that time we did not put our number on it. A number went on it at a later stage when the date was introduced, and that date was put on by somebody else in my office, not by me.

[144] Q Which date was that?

A The inception.

Q The 12th of February, 1974?

A Correct.

• • • •

[147] Q Now, did the broker say anything to identify who the material damage carrier was?

A No.

Q And did he say anything to identify the company [148] carrying the primary layer of business interruption coverage?

A No.

Q Did he say anything about whether the insured was located in Pennsylvania?

A No.

MR. HERSHEY: Your Honor, all these questions are leading and some of them the witness is answering inconsistently with prior testimony.

THE COURT: Well, that's a matter of cross examination. But don't lead the witness.

MR. TRENT: I wasn't aware it was leading; nevertheless, I will be careful.

THE COURT: Very leading. Don't suggest the answer to the witness.

BY MR. TRENT:

Q From the documents and what was said, where did you understand the insured was located?

A In Guinea.

Q And what is it that indicates that?

A The absence of anything else, and the fact that we were supposed to be re-insuring a Guinean company. We don't normally re-insure American risks through Guinea.

Q Does it give anything as to where the risk was located?

A Yes, in Guinea.

[149] Q It says in Guinea?

A Yes.

Q That's opposite what word there?

A Situations Guinea as original.

Q What is "S-i-t?"

A Situation.

Q Now, in what language is the name of the insured set forth?

A In French.

Q And do you know what the national language of Guinea is?

A French.

• • • •

[150] BY MR. TRENT:

Q Just tell us as best you can what was said and what was not said to you by the broker's representative.

A Sorry. I can't answer.

• • • •

[153] Q If you had been told that you would be subject to suit in event of loss in Pennsylvania, would you have accepted the risk?

A Subject to suit anywhere, I wouldn't have accepted it.

Q Other than where?

A England.

• • • •

[158] November 6, 1979
Pittsburgh, Pennsylvania

• • • •

[178] BY MR. TRENT:

Q I show you another document from the files of Insurance Corporation of Ireland, which has been [179] marked JG-2.

A (No response.)

Q I show you Defendants' Exhibit JG-2. I ask you what that is.

A This is the second page of an original slip.

THE COURT: Of what?

THE WITNESS: An original slip.

THE COURT: Original slip?

THE WITNESS: I don't know —there is something back of that.

Is there some backup there?

(Off the record.)

BY MR. TRENT:

Q Examination of the entries on JG-2 and other evidence we have discloses that it does relate to JG-1 and constitutes stamps of underwriters who accepted the risk in various percentages of the insurance covered by JG-1.

I have a typewritten sheet which I have marked JG-2-A, which states those in figures in a legible form. (Indicating).

(Off the record.)

THE COURT: All right.

Now, Mr. Hershey, do you have any problem with the authenticity of JG-2?

[180] MR. HERSHEY: No, I do not have any problem.

THE COURT: Very good.

MR. HERSHEY: Now this is JG-2 and JG-2-A.

I just wanted to be sure of the identification of those.

(Off the record.)

THE COURT: Just a second. He didn't identify them. He said he couldn't.

THE WITNESS: The point is, are you asking me if this is something I have seen?

I have seen it.

THE COURT: Excuse me.

Now, if there is a stipulation as to the authenticity of the documents—is there?

That's why I asked about the authenticity.

MR. HERSHEY: I agree that JG-2 is an authentic document which comes from the files of Insurance Corporation of Ireland recognizing that this witness cannot state exactly what that is. Therefore, how this document is to be tied in to the other evidence still has to be established above and beyond authenticity.

[181] BY MR. TRENT:

Q Do you agree these are stamps of the Excess Insurer Defendants who accepted shares of the risks covered by JG-1? (Indicating).

A Yes.

THE COURT: All right. That's all right.

We have solved that point, but I don't think this witness could have solved it.

Mr. Trent, let's move on.

BY MR. TRENT:

Q I show you next what has been marked JG-3.

(Indicating).

(Off the record.)

BY MR. TRENT:

Q Following JG-1 it appears that the ten percent opposite the stamp of the Insurance Corporation of Ireland has been crossed out and 60 percent has been written there. (Indicating).

Can you tell us the significance of that?

A I was asked to front. This is another word for to accept the business and reinsure with another company, this company being the Insurance Company of North America Reinsurance in Brussels.

Q Insurance Company of North America Reinsurance [182] in Brussels?

A Yes.

Q And what did you agree to do?

A To accept their line and reinsure it with them.

THE COURT: Accept "Their line"?

THE WITNESS: Their share, the share they wished to write and reinsure it with them.

THE COURT: Thank you.

BY MR. TRENT:

Q How much was that share?

A Fifty percent.

Q And I show you now —

THE COURT: Sixty percent includes the ten percent plus an additional fifty percent?

THE WITNESS: Correct.

THE COURT: Thank you.

* * * *

[183] Q I show you what has been marked as JG-13. (Indicating), which bears two of the stamps, that of the Insurance Corporation of Ireland, the first one ten percent and the second one sixty percent.

(Indicating).

The date opposite your initials here, January 22, 1976.

A (No response.)

Q I ask you to explain how that came into being and what it is?

A All right.

Following the claim we found that this was in fact a direct risk, as there was a company, Mercantile and General Reinsurance Company, who were unable to accept non-reinsurance business.

We were therefore asked if we would help them out of their problem by fronting them and this is why we increased the fronting from fifty to sixty percent, still retaining our own ten percent share.

Q All right.

Now do you know whether Insurance Company of North America, a Philadelphia company, does business in the London Insurance Market?

A Yes, they have a London company, Insurance Company of North America Reinsurance Company —[184] Insurance Company of North America, United Kingdom, Limited.

THE COURT: Now I can't understand something here.

You said that you fronted for Insurance Company of North America, Brussels, for fifty percent. You said you fronted for Mercantile and General for ten percent. You said you retained your own ten percent?

THE WITNESS: Yes.

• • • •

THE COURT: It should be seventy percent?

THE WITNESS: Seventy percent: ten percent, fifty percent, ten percent.

• • • •

[185] Q Would you tell us what the customs and practices in the London Insurance Market were with respect to information being given when a risk is solicited from you if the insured has already placed some insurance with your company in another field such as the aviation department or something like that?

Would you have access to information and know about it?

A No.

• • • •

[193] Q In Exhibit JG-1, the placing slip, the second line states opposite the printed word "form" in typing "as underlying as far as applicable."

Tell us what that means.

A It means will apply as far as applicable to this particular placing or policy. Obviously, the terms of the cover must be different because we are in excess of $10,000,000 and the original policy is on a primary basis for the first $10,000,000.

• • • •

[195] Q Can you tell us this, then: At the time you had received this placing slip, did you know what was in the underlying policy?

A No, but I would expect that underlying policy to have certain provisions.

Q What would they be?

A There would be a service of suit clause. There would not be a service of suit clause.

MR. HERSHEY: Your Honor, the witness —

MR. TRENT: Wait until the witness finishes.

THE COURT: That point is well taken.

MR. HERSHEY: He gave the same answer on deposition, and on deposition his answer was that the service of suit clause —

MR. TRENT: This is —

MR. HERSHEY: I object to having Mr. Trent inform the witness when the witness has given an answer that Mr. Trent doesn't like and then give the witness an opportunity to change that answer.

In that little sequence the witness added a "not" which is very significant in this case.

The witness first testified he would expect to have a service clause.

[196] MR. TRENT: He misspoke.

MR. HERSHEY: On deposition he said the policy should have a service of suit clause.

MR. TRENT: That was in a different context. If you are going to have it in the placing slip, you would have it.

MR. HERSHEY: I think Mr. Trent is here suggesting to the witness what the witness should answer.

MR. TRENT: Let the witness answer.

(Thereupon the reporter read the last question and answer)

MR. TRENT: I didn't suggest anything there.

MR. HERSHEY: I think what the record does not show is Mr. Trent's response once that first sentence was given.

MR. TRENT: I didn't say anything.

MR. MELLOTT: The record doesn't show the gestures which Mr. Trent made when the first was given.

MR. TRENT: I object to this.

THE COURT: That is known commonly as body language.

MR. MELLOTT: The record should show that Mr. Trent is three feet from the witness, and when the [197] first answer was given Mr. Trent made gestures which indicated surprise to the witness.

MR. TRENT: I was surprised because the answer was wrong, and he corrected it right away.

MR. HERSHEY: On page 18 of his deposition Mr. Grace says, "It is normal to have a service of suit clause in a policy."

THE WITNESS: Can I explain it?

BY MR. TRENT:

Q Yes.

A It's normal to have a service of suit clause in the policy if there is going to be service of suit anywhere outside either England or the country of origin of the risk.

That is why there is a confusion. We would not have expected to see a service of suit clause in this.

* * * *

[243] MR. TRENT: The only other thing I have here is the admission of exhibits, which were identified by Mr. Grace.

These are Exhibits JG-1, JG-2, JG-2-A, JG-3, JG-13, JG-11, JG-17.

Those are the exhibits —along with [244] Exhibit D.

MR. HERSHEY: Well, we will object to all of these exhibits on the grounds of relevancy because they are not related to the proceedings before the court today.

One of the exhibits was incomplete. We would have no objection if the additional attachment were affixed.

MR. TRENT: I have agreed to do that.

THE COURT: All right, the court will receive the exhibits pro forma.

* * * *

[246] CROSS EXAMINATION

BY MR. HERSHEY:

* * * *

[250] Q * * * * Did you know, Mr. Grace, of any notice being given prior to the 19th of March, 1979 that the excess insurers intended to declare the excess coverage void for material non-disclosure?

A No.

Q The question I asked at that time was, "Were you aware?" And your answer then was, "No. In fact, I would be prepared to warrant there was no notice whatsoever."

A That is correct.

Q So when you were shown this exhibit in your deposition, you testified that this was the first notice [251] given to CBG of any alleged material non-disclosure?

A That would be correct

Q Now, the letter sets forth various alleged material non-disclosures.

The first of them is that the insurance had a substantial United States connection.

When did you discover, Mr. Grace, that the insurance had a substantial United States connection?

A When we received it, the advice of the loss, we were told that there would be a lawsuit which would take place in Pittsburgh.

Q And when was that?

A That was in December of 1975.

Q All right. The second basis which allegedly provides grounds for avoiding the contract on the basis of material non-disclosure is that United States brokers were concerned with the placing of the insurance.

When, Mr. Grace, did you first learn that United States brokers were concerned with the placing of the insurance?

A On the 16th of December, when I received this —as mentioned in court this morning —a copy of the letter of December 5th, and first intimated that Marsh & McLennan, or the United States broker, was involved.

Q That is December 16th and the 5th of 1975?

[252] A That is correct.

Q Is that correct?

A Yes.

Q The next ground is a statement that the defendants were incorporated in Delaware in the United States.

When did you first learn that the defendants were incorporated in Delaware in the United States? Incidentally, the defendant means CBG, does it not?

A Yes.

Q When?

A At the same time.

Q In December of 1975?

A Yes.

Q The next alleged basis for avoiding the contract is that aluminum producers in the United States were substantial shareholders in the defendants.

That is in CBG, is that correct?

A Yes.

Q When did you first learn that aluminum producers in the United States were substantial shareholders in the defendants?

A At the same time.

THE COURT: Which is what?

THE WITNESS: December of 1975.

[253] BY MR. HERSHEY:

Q And the next alleged basis for avoiding the contract, according to Exhibit PX-1-G, is the policy issued by the Insurance Company of North America had been issued not on the London Insurance Market but at Philadelphia, Pennsylvania.

Do you recall when you first learned that INA in Philadelphia would be issuing the underlying policy?

A No. As mentioned when you took my deposition, I can't say when. I had no knowledge as to when.

Q All right. Would you have known that fact certainly by December of 1975?

A. Yes, definitely.

Q The next paragraph which alleges material non-disclosure says the INA policy contained no material damage warranty, and then you say in parentheses, or the letter does, it is standard practice in the London Insurance Market in this class of business to require the material damage warranty in any business interruption policy.

When did you first see all of the terms of the INA policy?

A When I actually saw the policy itself.

Q When was that?

A That was in December of 1975.

Q And no notice was given to CBG of any of those [254] alleged material non-disclosures until March of 1979, is that correct?

A That is correct.

Q Mr. Grace, when a broker brings you a risk in the London Insurance Market, you being the underwriter, does the broker have an obligation to tell you the location where the insured is incorporated?

A Yes. No, sorry. I beg your pardon. Where the insured is incorporated?

Q Yes.

A No. He does not.

Q He normally tells you where the risk is located, doesn't he?

A That is correct. And one would assume that the company was incorporated in the same area. It isn't normally spoken about. It's assumed.

Q Does the broker normally disclose to you the location of the producing broker?

A No.

Q Does he normally disclose to you the identity of the producing broker?

A No.

Q And by producing broker, we mean the broker from whom the London broker got his business, is that correct?

[255] A Yes.

Q And in this case, for example, Marsh & McLennan in Pittsburgh was the producing broker?

A Yes.

Q Does the broker normally reveal the identity of the shareholders in the insured corporation?

A No.

Q If the broker failed to reveal the identity of the shareholders in the insured corporation, would that be a material non-disclosure?

A No, unless they were in an area where one would normally expect to see a service of suit clause.

Q To your knowledge has the Insurance Corporation of Ireland issued insurance coverage to CBG other than the insurance coverage involved in this case?

A Yes. I told you when you were taking my deposition, in fact, that there was an aviation policy some years earlier. I was unaware of that until you told me.

Q Do you recall on your deposition that we discussed the fact that the policy contained a service of suit clause?

A Yes, we did.

Q And are you aware now that the Insurance Corporation of Ireland issued that policy containing the service of suit clause?

[256] A Only because you told me. I accepted your word.

MR. HERSHEY: I should mention that the policy has been submitted to the court attached to an affidavit which was introduced in prior proceedings.

BY MR. HERSHEY:

Q So your testimony, Mr. Grace, does not turn on what I said or what I showed you at the time of your deposition, I'll show you an insurance policy which appears to be at tab 7 to the affidavit of counsel filed on behalf of the plaintiff in this case, which I executed on March 19, 1979.

You will note, Mr. Grace, that the Insurance Corporation of Ireland, Limited, appears as one of the insurers, does it not?

A It does.

Q And that the policy contains a service of suit clause for the United States, does it not?

A It does.

Q And that this policy covers a period prior to the time when you agreed to underwrite the business interruption risk for CBG?

A Yes. But it was issued by an entirely separate organization in Dublin and not connected with my office in London.

And I think it should be pointed out that because [257] of the peculiar relationship that exists between Ireland and England, because Ireland used to be part of Great Britain, we are allowed to operate as a branch office whereas under normal circumstances we would be asked to operate as a separate company.

I have no connection whatsoever from an underwriting point of view with the aviation people in Dublin, so I have no knowledge of that.

Q But it is one corporation operating in both Dublin and London, is that correct?

A That is correct.

Q Mr. Grace, in London insurance practice, is it common for the insured to obtain a lawyer for the insurer when a controversy arises regarding a claim?

A It used to be common practice. It's now stopped. But this was an instance when this happened.

Q Let me show you, Mr. Grace, an exhibit marked as JG-12. I believe you testified that this was a compliment slip?

A Yes.

Q This is a slip which you received from a man named Gerald White, is that correct?

A That is correct.

Q For whom does he work?

A Bland Payne International.

[258] Q They were the insurance brokers in this case, were they not?

A They were.

Q Now, the note says, "I have phoned Mendes..." is that correct, and was that writing on the note when you received it from Mr. White?

A Yes. This is his writing.

Q And was that the first notice you had that Mendes & Mount would be representing you in this litigation?

A As far as I can remember.

Q And Mendes & Mount did in fact represent you and still represent you?

A They do.

Q And was Gerald White the one who arranged to have them represent you?

A Yes.

Q When he did that, he did it on behalf of the excess insurers, did he not?

A Correct.

Q And Exhibit JG-12 is dated the 16th of December, 1975. Did you receive the slip that is this exhibit on or shortly after December 16, 1975?

A Yes.

Q You testified yesterday that when a policy has not been prepared prior to the submission of a claim by

[259] the insured, it should be prepared afterwards, is that correct?

A. I didn't quite say that, but that is basically it.

THE COURT: Find out what he said then.

BY MR. HERSHEY:

Q Is there anything incorrect about what I stated?

A No. What you said is correct, but I didn't say that in exactly those words.

Q I see. Now, applying that principle, would you have expected Bland Payne after the date of this document, JG-12, to have prepared a policy covering CBG for business interruption losses in Guinea?

A Yes.

* * * *

[262] JAMES ROLAND BLAKE FOX-ANDREWS,

a witness called on behalf of the defendants, having been duly sworn according to law, testified as follows:

DIRECT EXAMINATION

* * * *

BY MR TRENT:

Q Tell us your name, please.

A James Roland Blake Fox-Andrews.

Q Where do you reside?

[263] A 20 Cheyne Gardens, Chelsea, London.

Q What is your profession?

A Barrister.

Q Tell us your education and professional experience.

A. Well, after coming out of the Navy in 1946 I went to Cambridge and got a law degree.

I was called to the English bar by Gray's Inn in January of 1949.

I was made a Queen's counsel in April of 1968, and I was made a bencher of the Gray's Inn in 1974.

Q Have you become familiar with the law of England relating to insurance contracts?

A I have.

[264] THE COURT: Are there any questions or cross-examination on qualifications?

(Off the record.)

MR. HERSHEY: I have no cross examination on qualifications, Your Honor, except I would like to ask the witness whether he has ever practiced in the insurance profession in London?

THE WITNESS: No.

MR. HERSHEY: That is, sir, you have never been an insurance broker?

THE WITNESS: I have not.

MR. HERSHEY: And you have not been an insurance underwriter?

THE WITNESS: I have not.

MR. HERSHEY: In London or anywhere else?

THE WITNESS: Or anywhere else.

THE COURT: Your practicing specialty before the court is insurance?

THE WITNESS: Entirely —except for arbitration as well.

THE COURT: All right.

MR. HERSHEY: Thank you.

BY MR. TRENT:

[265] Q I shall ask you now to assume the following facts, then I shall direct questions to you concerning them.

In January and February, 1974, one or more representatives of the London insurance brokerage house of Bland Welch & Co. Ltd., a Lloyds broker, the name of which was subsequently changed to Bland Payne Company, who were acting for Bland Payne Company or for its wholly owned subsidiary Bland Payne (International) Limited, all of which will be designated indiscriminately as Bland Payne, called upon representatives of the Insurance Corporation of Ireland and the other defendants except for Insurance Company of North America and except for L'Union Atlantique S.A. d'Assurances, and asked them whether they would accept a share of $10,000,000 excess business interruption insurance for Compagnie des Bauxites de Guinee, tendering them a placing slip in the form of excess insurer defendants' exhibit No. 1 [also designated defendants' exhibit No. JG-1].

A separate placing slip was sent by post to L'Union Atlantique, accepted by it and returned by post to Bland Payne. [266] This business was not initiated or requested by the Insurance Corporation of Ireland, the leading underwriter and the first one to sign the slip, and that the Insurance Corporation of Ireland never asked Bland Payne to obtain business for it.

According to the customs and practices of the London insurance market, the brokers must tell the underwriters all information which is material to the risk without being asked.

The underwriters also can, and often do, ask whatever questions they wish concerning the risk.

* * * *

[267] According to the customs and practices of the London insurance market relating to fire insurance, insurers do not consent to be sued in any foreign courts unless there is a service of suit clause in the slip.

According to the customs and practices of the London insurance market, the placing [268] slip expresses the terms of the insurance coverage in abbreviated form, using terms the meanings of which are known to the brokers and to the underwriters.

According to the customs and the practices of the London insurance market, the insurance company becomes contractually bound when its underwriter places the company's stamp and his initials on the placing slip. The contract thus formed is presumed by the parties to conform to the terms for such insurance customarily used by London insurers. It is the broker's duty to prepare a policy and submit it to the insurer for signature. The policy must follow wording customarily used for the coverage involved.

The business interruption insurance written for Compagnie des Bauxites de Guinee, the Plaintiff in the present action, which will be referred to as CBG, was in two layers:

The first $10,000,000 was written by The Insurance Company of North America, a Pennsylvania corporation having its principal place of business in Philadelphia.

The second layer, for an additional [269] $10,000,000, was written by the excess insurer defendants, so that if any loss were $10,000,000 or less, only the Insurance Company of North America would be liable, and if a loss exceeded $10,000,000, the Insurance Company of North America would be liable for the first $10,000,000, and the excess insurer defendants would be liable for the amount of the loss which exceeded $10,000,000, up to a maximum of another $10,000,000.

Each of the excess insurer defendants accepted a percentage of the excess of $10,000,000. Total acceptances exceeded one hundred percent, and so their percentages were written down in order that they would actually total precisely one hundred percent.

You will note on the placing slip, excess insurer defendants' exhibit JG-1, opposite the printed word "FORM" the typewritten words "as underlying as far as applicable."

These words mean, according to the accepted custom and practice of the London insurance market, that the business [270] interruption policy to be written for the higher layer will follow the form of the business interruption policy written for the primary layer, which would be in a form customarily used in the London insurance market.

When the Bland Payne brokers called on the underwriters for the Insurance Corporation of Ireland in January and February of 1974, the brokers did not disclose to the Insurance Corporation of Ireland any of the following facts:

(1) that the insured was an American corporation;

(2) that the producing broker was an American broker;

(3) that the risk had any connection with the United States of America;

(4) that in the event of a loss the insurers would be subject to suit in an American court;

(5) that the primary business interruption carrier was an American company;

* * * *

[272] On December 11, 1975, plaintiff filed the present action in the federal court in Pittsburgh. From information obtained in that action, the excess insurer defendants learned that the primary business interruption carrier was Insurance Company of North America, a Pennsylvania corporation having its office in Philadelphia, that plaintiff had instructed Marsh & McLennan, an American insurance brokerage house, to obtain the business interruption insurance for it, and that Marsh & McLennan had obtained the primary layer from Insurance Company of North America and had requested Bland Payne to obtain the excess layer on the London market.

Assuming all the above recited statements are true, I will ask you to answer certain questions. The first is: Under the [273] law of England, what law would govern the relationship of the plaintiff and the excess insurer defendants. English law or Pennsylvania law? Please explain the reasons for your opinion.

MR. HERSHEY: Your Honor, I would like to object on the ground that the assumptions on which the witness is being asked to express his opinion are matters which are not in evidence.

The assumptions therefore should not be accepted as fact, and any testimony given by the witness based on those assumptions should take into account the fact they are not established in this court.

THE COURT: Do you agree with all these assumed facts?

MR. MELLOTT: No, we do not, Your Honor.

In fact, the testimony of the prior witness is inconsistent with some of them.

THE COURT: You are speaking of Mr. Grace?

MR. MELLOTT: Yes, Your Honor.

THE COURT: Mr. Trent?

MR. TRENT: I suppose then we have to go over each one of these here. He can say [274] what he objects to then—

MR. MELLOTT: No. We object to all of them.

We don't accept as facts any of them. We do not take any of those as facts, facts that have been established in this case.

MR. TRENT: Well, let's take for example one of them, that the lawsuit was begun on December 11, 1975.

Do you not agree with that?

MR. MELLOTT: The facts as stated in the long resume, we do not agree with them in the manner in which they were stated.

They have to be properly established in this case and I do not believe that it is appropriate for me to have to take a certain sentence and say whether or not I agree with that sentence.

MR. TRENT: These are things he has to do.

THE COURT: We will see what we are really doing here.

MR. MELLOTT: Your Honor, we are getting into the merits here.

He is trying to force me at this point [275] to try the case on merits, and that is wholly inappropriate.

This is not a proceeding to try this case on merits.

THE COURT: I agree with you.

MR. TRENT: Well, I thought we had it all out this morning.

THE COURT: Well, I think what we will do, even though these facts are in contest —see, the problem is that we haven't heard the underlying proof of these facts, Mr. Trent. That's what the problem is. That is the problem. That is what they are contesting.

MR. TRENT: Mr. Grace covered all of them in his testimony.

There were one or two things in addition I was going to read, but I assume opposing counsel —

THE COURT: See, we are really into trying the case here right now, basically.

MR. TRENT: We discussed that this morning, Your Honor, and thought it would be of assistance to have Mr. Fox-Andrews' views on the British law.

THE COURT: I thought maybe he could [276] express his views without being so specific, you know.

You know, gentlemen.

MR. TRENT: Well, he can express them in any form that Your Honor would like, specific or general.

THE COURT: I think we ought to -

MR. TRENT: I submitted this summary to opposing counsel some time before we began this afternoon and they had an opportunity to read it.

They made no objections.

MR. HERSHEY: Just a minute.

This was furnished to us before we resumed this afternoon, Your Honor.

MR. TRENT: About 20 minutes.

THE COURT: Well, the problem as I say, of course, is I could listen to it with the understanding it is not binding on anything.

If you just want to go through, you know, an academic recital, all right.

MR. MELLOTT: Well, if Your Honor wants to do that, all right; but I just want the record to show our objections.

THE COURT: Well, I want the record [277] to also indicate that this is not in any way binding on the court; to the contrary — the court knows it is not bound by these statements and that these are not facts.

These are going to be considered by the court to be true hypothetically just for the sake of allowing this gentleman to express his views in light of these facts.

We will allow it but the court is not going to in any way allow the evidence to be used subsequently in the course of the trial of this case.

All right.

MR. TRENT: Shall I read the first question again?

THE WITNESS: No, no need. * * * *

A The question assumes the contract the Plaintiff made with Insurance Corporation of Ireland was a separate contract from that made with the other twenty-one excess insurers; that assumption is right.

In English law these would be regarded as separate contracts that came into being at the time each of the underwriters, on behalf of their respective companies, signed the slip that was offered [278] to them by Bland Welch.

* * * *

In my opinion —English law —and the reasons I will indicate in a moment —the English law would hold that the proper law of this contract was English.

In English law the determination of the proper law is by seeking to ascertain the intentions of the parties to the contract as manifested by them at the time the contract was made.

* * * *

[287] THE COURT: What does this mean here: "Agree if required sign as R/I" —what is "R/I?"

THE WITNESS: Reinsurance.

THE COURT: "Agree if required sign as R/I of local company to be advised to leading underwriter Full R/I Clause (ex retention)?"

THE WITNESS: That would mean the Guinea company.

THE COURT: Are you sure it is the Guinea company; are you satisfied in your mind?

THE WITNESS: Yes.

THE COURT: Are you satisfied about that?

THE WITNESS: No doubt at all, sir.

THE COURT: "To be advised to leading underwriter Full R/I Clause (ex retention)."

Any one to advise the underwriter that [288] Insurance Company of North America was in any way connected with the policy or did they?

THE WITNESS: Oh, no, not at all.

These words "As underlying as far as applicable," in the absence of any contrary evidence before it the court I am sure would say well, if this was the only information given to the underwriter, the underwriter was entitled to assume that the underlying policy had been written in London according to the ordinary customs and practices of the London insurance market. That's why I say it seems to me that unless evidence is produced and set forth from certain Bland Payne witnesses as suggested -otherwise, unless the evidence shows that Insurance Corporation of Ireland was told that the underlying policy was an American policy, the English court could construe that document as being a reference to a policy which had been written in the London market.

THE COURT: All right.

Anything else, Mr. Trent?

MR. TRENT: Yes.

BY MR. TRENT:

Q Can you tell us whose agent the broker [289] is in a transaction such as this?

A Well, I mean when you talk about Lloyd's brokers, you are talking about people who invariably are the agent of the insured—

THE COURT: Insured?

THE WITNESS: Yes.

I mean you don't have to have a slip.

If in fact you have got an insurance agent acting for the insurer. The very fact of where the whole business was done here, the underwriter in London —and they just don't use a Lloyd's broker in procuring business.

It is the insured who comes from abroad and to a large measure who goes to a broker because a broker has the expertise in placing the business among the twenty-two insurers in this case, but there are hundreds and hundreds of insurance carriers in business in London.

It is the broker who knows best the particular underwriter to go to to cover this sort of risk and write this sort of risk.

That's what the foreign insured is [290] looking for. He is looking for expertise of the man who knows where to go, be it A, B, or C, for a particular risk to be underwritten.

And if he was in fact employed by D, it would mean of course that the insured abroad wouldn't be given the best service.

Therefore, why should a man go to a Lloyd's broker unless it is to get better service as to how to place the risk in the London market.

THE COURT: What do the words "Primary policy contains deductible seven days and twenty-eight working days applicable to wharf area as more fully described in original policy"—that the primary policy —and it is also speaking of the original policy.

THE WITNESS: Now, the primary policy is the underlying one.

THE COURT: The Insurance Company of North America policy?

THE WITNESS: Yes.

As we now know but not known at the time of the original.

THE COURT: Doesn't that suggest to you that the parties' contemplated that the [291] policy would contain certain words and phrases that in fact were created?

Does that not suggest that to you?

THE WITNESS: Well, I mean they certainly contemplated there would be an underlying policy for the primary layer.

THE COURT: They go further and say further what this primary policy contains.

THE WITNESS: Well, that's only because that is a rather special term which ordinarily would not be found in the underlying policy itself. It is specifically mentioned there.

THE COURT: But at that point the parties must have contemplated where this policy was to exist or how it was to exist?

THE WITNESS: Well, no.

THE COURT: You don't agree to that?

THE WITNESS: No.

It was only complicated in one rather unusual term and that should be contained in the policy.

THE COURT: And it said "More fully described in original policy."

THE WITNESS: The original policy is of course in this sense and in my view used to [292] denote the policy that the Guinea insurance company was going to issue originally.

The two expressions here which we have "Primary Policy" and "Original policy,"original policy is the Guinea policy. The Primary policy is the first layer policy.

THE COURT: Which was the Insurance Company of North America Policy?

THE WITNESS: Yes.

THE COURT: That wouldn't suggest to a reasonably prudent underwriter that he ought to look at this primary policy to satisfy himself that it does not in fact contain what it says it contains?

THE WITNESS: No, because he is being told that it does.

He is prepared to sign the slip on the basis that the primary policy will contain that term; but is entitled to assume that unless he is told to the contrary the primary policy would otherwise contain the terms ordinarily written on the London market.

THE COURT: You indicated even though the premium is paid in pounds and the claims are paid in dollars, that doesn't mean anything?

[293] THE WITNESS: Nothing at all. The London market which is concerned throughout the world, handles many transactions expressed in dollars. That has no connotation at all.

THE COURT: All right.

(Off the record.)

BY MR. TRENT:

Q Now you have told us that English law would apply to this insurance contract and its making.

Now would that law also apply to other Excess Insurer Defendants?

A Well, I would want to qualify my answer on that.

Q Sure.

A To the extent that on the assumed facts I don't have very much assistance as to the other contracts, but in the ordinary way in the English court when this would be interpreted, when interpreting the following, once they are satisfied that the lead insurance contract is governed by English law would save in the most exceptional case invariably hold that all of the following contracts were also subject to the same law, namely, English law.

* * * *

[296] THE COURT: I think what the terms of the contract are, are right in the placing slip.

THE WITNESS: That is not all, no. I mean, once it was assumed that the words "as underlying as far as applicable" relate to the contract in the London Market, that once assumed, since there is no reference to a service of suit clause in the underlying policy, no service of suit clause, and since it was written in the London Market, it would be assumed that the underlying policy had a material damage warranty because all policies written in the London Market for business interruption do have a material damage warranty clause.

So it is not quite true that looking at the slip tells you all the terms. It is looking at the slip and knowing the customs of the London [297] Market, where I am asked to assume certain facts, that tells you what the total contract is.

* * * *

[301] THE COURT: Suppose this underlying policy, INA, was never issued prior to the issuance of the slip. Is that a material difference?

THE WITNESS: I don't think it's material. The slip is placed before the underwriter, and that is relevant. If nothing is said, then it matters not whether the INA policy has been issued or not.

The underwriter in the absence of any thing being said is entitled to assume it is written in London, and therefore subject to the London Market practices.

MR. HERSHEY: For clarification, is that last statement a statement of law or a statement of the London Market practice?

THE WITNESS: Well, I think the difficulty is that, of course, underlying my answers of necessity are the assumptions contained in the documents that Mr. Trent put before me.

MR. HERSHEY: Yes. But are you saying then that you are assuming a set of practices and you are not saying that those practices must be followed as a matter of law?

[302] THE WITNESS: Oh, no. I am not going as far as that.

MR. TRENT: What he said was—

MR. MELLOTT: I think the answer is clear.

MR. TRENT: The underwriter was entitled to assume something, and that's a matter of law.

MR. HERSHEY: Now, you have testified contrary, I think, to what the witness said.

MR. MELLOTT: The record will show it.

THE COURT: Let me ask you this question. If the placing slip is silent on the location of the office of the primary insurance carrier, nothing said about where it is located, you assume that it is located in London?

THE WITNESS: We do.

THE COURT: All right.

MR. HERSHEY: But then again, that is an assumption which is a matter of practice, not of law, that is, there is no English law that says that an underwriter is entitled to be told something, and if he is not told it, then one assumes it is entirely domestic, a London matter?

THE WITNESS: Can I put it this way? These are contracts that you give me today. There is an obligation to make a full and frank disclosure, to make [303] disclosure of everything relevant. If you don't, it has two possible effects.

One is that you are entitled to treat the contract as avoided, and the second one is that it affects the actual terms of the contract.

So far as this case is concerned, it seems to me that if nothing is said at the time the risk is placed, that when the underlying policy was written the primary carrier was otherwise than in England, then as a matter of law the underwriter would be entitled to assume that the underlying policy was in the London Market, had been written in the London Market.

MR. HERSHEY: Would you be able to cite a case that says the underwriter is entitled to assume that?

THE WITNESS: No. I don't think I necessarily could.

MR. HERSHEY: It's not a matter of statutory law?

THE WITNESS: Oh, no. The only statutes in my view have little relevance, save possibly as far as Bland Payne are concerned.

THE COURT: If you have no legal precedent for your statement, upon what ground do you make the [304] statement?

THE WITNESS: I suppose practicing in the insurance law.

THE COURT: Are you saying that assuming this is a case of first impression, that this is your best guess as to what the court would do?

THE WITNESS: I think that is probably fair, yes.

• • • •

[311] BY MR. TRENT:

Q Will you tell us under the law of England on these assumed facts whether the Insurance Corporation of Ireland had ground to rescind the insurance contract, and give us your reasons for that.

A Rescind isn't the appropriate word.

Q What is it?

A The appropriate word is avoid.

Q Very well.

A And if I might explain what in practice that means, if an Insured breaches his obligation to make a full and frank disclosure of all material facts, then on the insurer becoming aware of the material non-disclosure, he elects to approbate the contract, or give notice to avoid it.

He must do so within a reasonable time of all the facts coming to his knowledge.

If he decides to avoid the policy, the effect is this. Either the insured can accept the avoidance in which case the contract is void ab initio, as if it never was, or the insured can say, no, I don't accept that you have any right to take the action you have taken, [312] and I'm going to take you to court now, claiming the sums due under the policy.

It is at that stage then that the insurers come in as defendants and the onus is on them to establish that they were entitled to avoid the policy.

The court will assume that the insured is entitled to recover under the policy. It's a presumption in his favor, and it is up to the insurers to rebut the presumption to show at the time they made their election, or indeed other matters that came to their knowledge after they made their election, justified the making of the election that they did.

That is how it works in practice. So it seems to me if one looks at this case, so far as the matters other that the earlier damage in Guinea was concerned, on the answer that Mr. Grace gave in the box this morning, certainly I'm not at the moment trying to be too specific about it, but certainly on the information that much of the knowledge came to him in December of 1975, he, or ICI, will have been deemed to have elected to approbate the contract, to waive their right to avoid the contract, the policy, on those grounds.

But then on the evidence, as we had it, in November of 1978, as the CBG engineer being [313] questioned when his deposition was being taken, matters for the first time came to the knowledge of the insurers, which, if they are established as being true, an English court would hold were material. That is to say, that a reasonable, prudent insurer would have regarded them as significant either in deciding not to accept the risk at all, or accept it at an enhanced premium.

Therefore, so far as that matter is concerned, clearly so long as the right was exercised within a reasonable time, and the right, I think, was exercised on March 19th, certainly in England that would be regarded as having been exercised within a reasonable time, that the insurers would be likely to be held in English law to have properly avoided the policy with justification.

BY MR. TRENT:

Q We had some testimony before I got into the case, not testimony, but statements by Mr. Bruckmann of the New York office of Mendes & Mount, and arguments before the court, that under the English law the insurer merely had to give a notice of avoidance, and just by giving that notice, that automatically avoided and wiped out the whole policy from the beginning.

Would you give us your comments on that?

[314] A I think I explained it, haven't I?

Q I think so, but I wanted to make sure.

A The answer is that if the insured accepts the avoidance, then, of course, Mr. Bruckmann was correct.

If the insured doesn't accept the avoidance and takes the insurers to court, then, unless and until the insurers discharge the onus upon them of showing they were justified, then Mr. Bruckmann is wrong.

* * * *

[315] BY MR. TRENT:

Q You mentioned a short time ago something about the premium for the policy being paid in London to the insurer, and I would like to ask you if you would tell us just what the law is with respect to the payment of the premium, and tell us whose agent the broker is in connection with the payment of the premium, and what the fiction is under English law in that respect.

A Well, I wonder if I have all the assumptions of fact.

THE COURT: Rather than use the word fiction —is that word ill-advised?

MR. MELLOTT: That is probably appropriate in the way he stated the question, Your Honor.

MR. TRENT: That is a term of art, fiction.

[316] THE COURT: It's not a term of art.

MR. TRENT: I learned that in law school there were a great many fictions in the law.

THE COURT: Well, I think that statement was said by your professor with tongue in cheek.

MR. TRENT: Perhaps I missed where the tongue was placed.

BY MR. TRENT:

Q Will you tell us under English law how the premium is paid, who pays it, whom the payer is representing, and so forth, because we had some statements by Mr. Bruckman on that, also, and he mentioned that as far as the premium was concerned, it was a principal to principal contract, and I had difficulty understanding him, and wonder if you could explain it.

A I can't answer fully because I can only deal with the law. Once the court was satisfied that a Lloyds broker acting for the insured had been the party placing the risk in the London Market, the following consequences apply.

The underwriter could not sue the insured in an English court. He wouldn't have a cause of action. He could only sue the broker.

This has some surprising consequences. If, for example, after the insured has paid the broker, and [317] the broker goes into liquidation, then all the underwriter can do is sue in the liquidation for distribution. He can't go back to the insured and say we have never received our premium, please pay.

Equally, if the insured hasn't paid, and the broker goes into liquidation, it's the liquidator who has the right to recover the premium from the insured, and once again, all the underwriter can do is sue in the broker's liquidation.

Q What is the theory behind that?

A Well, I think that I am not sure about theory. The answer is that in the historical development of the London Market, unless some foreign insured actually arrived with his money then and there, the underwriters wouldn't have accepted the risk at all because there was a trust between underwriter and broker.

Q You say foreign insured?

A Insured. There was the trust between the broker and the underwriter, or the underwriter and broker, with the result that since the underwriter knew that he had a right of action against the broker for the premium, he accepted the risk then and there.

It was up to the broker to so conduct his affairs with his client, the insured, that he, the broker, would get paid by the insured.

[318] I mean that's the background.

THE COURT: Basically, the broker is not agent for either one?

THE WITNESS: Well, that's what I mean. It's very often said that the two things —in paying the premium, the broker is acting as the agent of the insured. But a more accurate way of describing it is in the payment of the premium there is a principal to principal basis between the underwriter and the broker.

THE COURT: Yes.

THE WITNESS: I believe it is the latter that is the more accurate of the two. If it was a pure agency, obviously, the underwriter would sue the principal, which you can't do.

THE COURT: So you have a situation where the writer —

THE WITNESS: The principal to principal thing, as far as I know, would be said to apply only so far as the payments of the premium is concerned.

THE COURT: What are the other relationships that might bespeak of agency, if any?

THE WITNESS: I mean, certainly in the ordinary way it's the broker who acts as agent for the insured in making any claim on the underwriter.

[319] When a Lloyd's broker is used, the insured makes a claim direct on the underwriter, and he does it direct through the London broker, if that is the only agent, or, and whereas, we know the facts here of the producing broker, Marsh & McLennan, then the insured goes to the producing broker, who goes to the London sub-agent, Bland Payne, in this case.

BY MR. TRENT:

Q We had some discussion yesterday about if the court were to dismiss this action for forum non conveniens, the depositions and all the discovery which we have taken here could be used in the pending action in London, or in any new action which might be filed in London.

A Mr. Hershey said he would only be satisified by the statement of a judge. I will have to satisfy His Honor as a barrister that that isn't true. It's a matter of agreement between the parties as to the form the evidence goes in. If the parties agree that the depositions taken for one purpose in one action should be used for another purpose in another action, there is no rule of law at all which would prevent the parties from so agreeing.

Q So then the discovery in this case could be used in suit in London, if we so agree?

A It must follow, the consequences of what I [320] just said, so long as there is an agreement between the parties. Unless the parties are in agreement then, of course, what Mr. Hershey has said is absolutely right.

Q But if we agreed to do so, it could be done?

A That's right.

THE COURT: Would you say that if the court here —just assuming for the sake of argument—that English law should apply, that the court would apply the principles as you enunciated them and the court would be on the right track?

THE WITNESS: Yes, Can I make this qualification? Even in the English courts, the Queen's Bench Division to which all this work is assigned has got within it what is called the Commercial Court.

It's a court which cooperates with the city's interest, the insurance world, shipping and the like, seeks to provide a very rapid and speedy service for litigants concerned in these sorts of matters. The court is wholly manned by people who specialized in Lloyd's work, shipping work and not only do you get a remarkably speedy trial, but you start off with somebody who has the law and the sort of readiness to accept evidence of customs and practices absolutely at his fingertips.

[321] In some ways our courts are slow, and in some actions it takes a long time to come on, but in the Commercial Court it's one of the most impressive services provided by people who have got advantages that other high court judges sitting in the Queen's Bench haven't got, and if the action was heard by them instead of by the commercial judge, then I would have thought the probability is that the difference between being tried by an ordinary

Queen's Bench judge or by Your Honor mightn't be that all disparate.

THE COURT: You have to stipulate to go before the Commercial Court?

THE WITNESS: Oh, this action in London would go—it is just the sort of action that the Commercial Court holds itself out to deal with speedily and effectively.

THE COURT: Is that a matter of stipulation to go there? Can a litigant be forced into Commercial Court against his will?

THE WITNESS: It's the decision of the court. If one party, a plaintiff, wants to go into the Commercial Court and the other doesn't, then that application by the party who doesn't want to go to the Commercial [322] Court shall be heard by the Commercial Court, and if the only reason why he is seeking not to have the court try it is that he is trying to delay the case, his application will be rejected if it is genuinely the kind which is heard in the Commercial Court, the kind heard in Commercial Court.

One of the ironies is that but for the injunction, a decision in the Commercial Court in this case that was started in March would have already been obtained.

THE COURT: How could that be? Because you don't know what the liability is.

THE WITNESS: It wouldn't matter. I mean, because of the form of proceeding there in England, I can't imagine anyone wouldn't want to have matters relating to the totality of the claim being tried in England.

THE COURT: For example, suppose the damage amounted only to $900,000, and there was an argument on the question of fact in this court as to whether or not it was $9,000,000 or $12,000,000? Until that was litigated over here, how could you litigate there?

THE WITNESS: Because you wouldn't be concerned with figures. You would be concerned with principles, and concerned with the fact whether the [323] excess insurers are on risk at all. If they are on risk, then the ideal court for it to be tried in is this court because the action is well advanced. But the decision as to whether or not the insurers are on risk or entitled to the benefit of a late notice, seems to be demonstrably better tried in England because the real evidence there involves the Bland Payne witnesses, and no one knows if they are ever going to come up and dispute what is said by the underwriters.

MR. MELLOTT: I would just like to note for the record that we are hearing now, Your Honor, is not testimony but argument of counsel.

THE WITNESS: Well, I would accept that.

* * * *

[328] THE COURT: You don't think in the course of pushing litigation, promptness has anything to do with it?

Do you believe that justice delayed is justice denied?

THE WITNESS: Of course I do.

Of course, I accept that.

It is the difficulty about this case —and I have only been involved recently. I think I first came in on this in June of last year and it was very shortly after that that I came into it that this evidence emerged through an interview —

THE COURT: You do believe in that principal?

THE WITNESS: Yes.

I would like to make it clear, I don't profess to be here before Your Honor as an uninterested witness.

I mean I am -

THE COURT: You are an interested witness?

THE WITNESS: I am an interested [329] witness. I was retained by the Excess Insurers here.

This information only recently came to light and that caused this radical change in view. We took the view it was really desirable....

Here was a non-disclosure point which clearly had not been waived.

One is not now entitled to look at the revised matter which had been waived. There was no knowledge as to the American connection.

There has been criticism over and over again for delays, some of which I think are untrue because we are trying to do the best we can. We are trying to get a speedy determination of the contract so that the whole matter on quantum can be dealt with.

MR. MELLOTT: If the court please, I apologize for interrupting again, but I think the record should be clear that counsel's argument is not testimony and should not appear in the court record as testimony.

THE COURT: We agree to that.

I think the witness has said he was an interested witness, was engaged by the Excess Insurers as a barrister to develop their [330] case, and so he is very much interested in the outcome of this litigation, much more so than an uninterested expert would be.

MR. MELLOTT: That's obvious.

This man was put on to testify as to English law, not to go on the stand and be an advocate of the position of the defendants in all phases of the merits.

MR. TRENT: I don't think he has done that, no.

THE WITNESS: Your Honor, please excuse me.

I am saying that I was really trying to answer Your Honor's question about justice delayed is justice denied.

I was only trying to indicate my response.

To be an advocate wasn't my intention.

• • • •

[338] THE COURT: There is only one result. There is no difference in results.

MR. TRENT: A difference in evidence. There may be a difference in evidence the way it comes out.

THE WITNESS: Yes, I agree with you. There may be a difference as to the result of the forum.

The forum has a lot to do with results. Because of the burden and the problem of proof —and that is a big problem here.

THE COURT: Now we are doing this just like shopping around for a forum to get the best forum.

You can get the best angle to prove your case, and as I see it, I can say this [339] forum shopping, had it been done expeditiously, had it been done immediately all right.

But to wait and wait and wait, it seems to me improper.

* * * *

[347] CROSS-EXAMINATION

BY MR. HERSHEY:

Q Mr. Fox-Andrews, you have referred to a proceeding in Commercial Court which is part of the Queen's Bench Division.

Would that proceeding be before a jury?

A No.

THE COURT: That is all you wanted to know, right?

(No response.)

THE COURT: Anything else?

BY MR. HERSHEY:

Q You testified about some material non-disclosures and you testified that some of them have been waived by Excess Insurers. Those were material non-disclosures of which the Excess Insurers knew in 1975, that is alleged material non-disclosures-but did not bring this forth until 1979; is that [348] correct?

A Yes. Now I want to say something.

THE COURT: Yes.

A I don't know whether this is a proper answer and if it isn't, it can be withdrawn.

The first reference as far as I know was made in an affidavit I swore on about the 2nd of July, last July.

THE COURT: What was the date of the affidavit?

THE WITNESS: The date was July 2, 1978.

BY MR. HERSHEY:

Q Which said what?

A In which I set out these matters —but there was no claim at that point that the policy might be avoided.

Q The first claim of that was made in March of 1979?

A That's right, that is my understanding.

Q So that between March of 1975 when the Excess Insurers first discovered -

A December, '75.

Q December of '75?

[349] A. Yes.

Q —when the Excess Insurers first discovered these facts and March of 1979, there was no suggestion that the policy might be voided?

A Well, no. I am having trouble with your "suggestion." If you mean suggestion in the pleadings, then I would wholly agree.

Q No suggestion made to Compagnie des Bauxites de Guinee that the policy would be voided?

A I think that is substantially correct. I forget the precise wording of my affidavit. I think in the course of my affidavit I may have set out these matters should have been taken speedily. Had they been taken speedily, there could have been matters upon which the policy could have been avoided. I cannot recall now where the affidavit went from that point.

* * * *

[351] BY MR. HERSHEY:

Q Let me read to you from the amended answer, the amended answer which is in PX-1.

It says that "the damage in question occured prior to the date on which the policy and cover note in question were issued and the alleged loss is not covered under the said policy and cover note"— and then in the next paragraph, "By way of further defense, these defendants aver that the said prior damage to the property in question was not revealed by the plaintiff to these defendants prior to or at the time of the issuance of the said Policy No. 71HF1195 and cover note, all of which is contrary to the terms, conditions and provisions of the said policy and cover note and all of which serves to eliminate coverage for the alleged loss."

Now, assume that the excess insured had facts to support the allegations that they submitted in their defense but did not seek an avoidance of the contract on that ground until March of 1979.

Would they have waived their right under [352] English law to avoid the contract on that ground?

A I think that is capable of a clear answer. If the totality of their knowledge today is that which was gained in November of 1978 and in February of 1976 they had the same knowledge as they had in November of '78 and have today, then they waived it. They waived the right to avoid the policy.

* * * *

[357] November 7, 1979
Pittsburgh, Pennsylvania

THE COURT: You may proceed.

MR. HERSHEY: Mr. Fox-Andrews was on the stand, Your Honor.

THE COURT: Yes.

JAMES ROLAND BLAKE FOX-ANDREWS, having been duly sworn according to law, resumed the stand the testified further as follows:

CROSS-EXAMINATION (Cont'd.)

BY MR. HERSHEY:

Q Mr. Fox-Andrews, yesterday the court asked you whether an underwriter has any obligation to ask questions of a broker.

I believe your testimony was that the underwriter has no obligation to ask questions, is that correct?

A That is correct.

Q Would you agree that an underwriter has an obligation to make inquiry when a risk is presented to him for underwriting by a broker?

A Obligation, no. In practice it would be surprising if an underwriter didn't ask some questions to clarify the risk, but certainly no obligation, no duty upon him to do so.

[358] Q Is it the duty of a broker to disclose to an underwriter things that an underwriter could have found out from other sources?

A Absolute duty, yes.

Q So you would not agree that among the facts which need not be disclosed to an underwriter by a broker are facts which the underwriter could have discovered by making inquiry?

A The broker in that case has the duty to inform the underwriter of all those facts as well as others.

Q Are you familiar, sir, with a work called "General Principles of Insurance Law" by Hardy Ivamy?

A Yes.

Q Do you regard that work as authoritative on questions of English insurance law?

A I do.

Q Have you ever read the work?

A I have a copy in my bag in the court. Could it be brought over?

You may be put off by the fact that you have an edition which was superseded by a new edition three weeks ago.

Q This is the fourth edition. I have reference to the third edition. I have now found in the fourth edition what apparently appeared, also, in the third edition.

[359] THE COURT: It would be a good idea to correlate what page in the fourth edition compares to the third edition.

BY MR. HERSHEY:

Q I was referring in my previous question to page 122 of the third edition, and the material appears in the fourth edition on page 149 under the heading, "Facts Which Need Not Be Disclosed."

Under that heading appears this paragraph, "Facts which would in ordinary circumstances be material may become immaterial in the special circumstances of the case, and the assured is then under no obligation to disclose them. Facts which may thus become immaterial may be grouped under the following classes:

"1. Facts which are known to the insurers or which they may reasonably be presumed to know.

"2. Facts which they could have discovered by making inquiry.

"3. Facts as to which they waive information.

"4. Facts tending to lessen the risk.

"5. Facts, the disclosure of which is unnecessary by reason of a condition.

"6. Facts concerning spent convictions'"

I believe all of those are self-explanatory with the exception of the last.

[360] Mr. Fox-Andrews, do you agree that that is an accurate statement of the English law?

A No, not as it stands alone. I mean, it's the first two of those six that are relevant to the questions you have been putting to me.

Q I believe, as I way saying, those are all rather self-explanatory except the last one regarding the spent convictions.

Can you tell the court what spent convictions are?

A Yes. I forget the name of the act, but about three years ago it became inadmissible in a proceeding in England, and after a passage of time they were regarded in English law as not applicable to that person. It was spent. They ceased to have effect.

Q Expired?

A Yes.

Q Mr. Fox-Andrews, on page 151 of the fourth edition appears this paragraph. It appears under the heading of, "Facts Within Constructive Knowledge of Insurer.

"Actual knowledge is not essential if the insurer knew that he had the means of knowing the fact. If, for example, he knew that he could learn at Lloyds the exact cargo which had been shipped and chose not to ascertain it, it would be considered to be within his [361] knowledge." Do you regard that as an accurate statement of English law?

A Oh, yes. If I may explain, if you have given the principal information that you are insuring a cargo, then you can ascertain easily the precise nature of the cargo, whether there is some inherent risk or not.

But then, of course, the underwriter will make his own inquiries.

But the absolute duty of the broker to explain the risk always remains.

MR. HERSHEY: Your Honor, I would like to offer into evidence the two passages I read from the work by Hardy Ivamy "General Principles of Insurance Law," in the third edition.

That exact language appears on pages 122 and 124, and we would offer those two pages of the third edition.

THE COURT: Do you have those Xeroxed?

MR. HERSHEY: Yes.

MR. TRENT: I object. The witness said he doesn't agree with them.

THE COURT: I think we will overrule you on that. The witness said this is a leading text on the subject. He concedes this.

[362] If he concedes it's a leading text, it certainly would be relevant to the question of law as to what the law of England is.

It would not necessarily be conclusive because, if I recall yesterday, the witness said he didn't have any cases that could be cited on this point.

MR. TRENT: Technically, Your Honor should delay ruling until after the redirect examination of the witness on the point.

THE COURT: Well, it seems to me that it's admissible, but it's a question of what weight I will give to these particular pages in this learned treatise.

I think it's admissible.

MR. HERSHEY: It's offered on cross-examination.

THE COURT: Did you have it marked as an exhibit?

MR. HERSHEY: I offer pages 122 and 124 of the third edition of "General Principles of Insurance Law" by Hardy Ivamy as PX-7.

THE COURT: You are going to make an objection, are you not?

MR. TRENT: Well, I must concede that they [363] are copies of the pages out of the book.

THE COURT: You are objecting to the admission into evidence, are you?

MR. TRENT: I will stand on my previous objection which Your Honor has overruled.

THE COURT: Very good. This is admitted and made part of the record, pages 122 and 124 of the third edition of a volume known as "General Principles of Insurance Law" by E. R. Hardy Ivamy.

* * * *

[364] MR. HERSHEY: I have no further questions on cross examination.

THE COURT: Any redirect examination?

MR. TRENT: Yes, Your Honor.

* * * *

[385] BY MR. TRENT:

Q My question now is, can you tell us any more about the theory behind the rule pertaining to the insurer having the right of action only against the broker for the premium?

A Well, I can tell you about the law. I am not sure I can tell you the theory. It's extremely well set out in the second of the three principle books on insurance law.

Ivamy is among those, and the second one is by MacGillivry and Parkington on insurance law, and this is the sixth edition, paragraph 438 is in these terms on page 180.

It says this, "By reason of a long established custom or usage of Lloyds, the underwriter does not claim the premium from the assured but from the Lloyds broker, and the broker in turn looks to the assured for payment. The custom is founded in the ancient usages of the marine underwriting business in London, and the courts have had [386] it proved a sufficient number of times to accord it judicial notice. So far as the Lloyds broker and the underwriter are concerned, the premium is treated as a debt due from the broker alone, so that the broker is the principal debtor to the underwriter for it in addition to being an agent of the assured to negotiate the insurance cover."

* * * *

[388] THE COURT: In other words, your ship is ready to leave port, and you can't lay around two or three weeks to see what is done?

THE WITNESS: Yes. Much insurance is written in the day. It's all done with immense speed.

THE COURT: So speed and accelerated activities are the two reasons this would be?

THE WITNESS: That's right. I mean one of the oddities in the insurance market is how little paperwork there is. Here you have a contract on a slip which contains twenty or thirty lines, and yet it is insuring business of $10,000,000.

Practically all the underwriters' documentation is the slip with one or two copies of any documents that may be shown to you.

THE COURT: It's like a courier?

[389] THE WITNESS: Yes.

THE COURT: It's not hard to understand.

MR. TRENT: I was going to ask whether the second sentence in paragraph 439 on page 441 is the rationale for it.

A Yes. "The usage is sufficiently old to have been recognised in the days of Lord Ellenborough, and may have been intended to bestow a degree of security upon the underwriters by allowing them to look for payment to a broker known to them rather than an assured whose reputation was unknown to them. The legal rationale for this course of business is that the broker is considered in law as having paid the premium to the underwriter in place of the assured, and that it has then been lent to the broker by the underwriter as evidenced by the credit item entered in his accounts in favour of the latter."

* * * *

[435] THE COURT: All right.

Any cross-examination?

MR. HERSHEY: Just one or two items, Your Honor.

* * * *

[437] Q My question is: Is it merely the slip which determines the terms of the contract?

Or is it also what the underwriter is told but is not put in writing on the slip and what the underwriter may be assumed to know which determines the terms of the contract?

A Essentially the terms of the contract are those contained in the slip, together with any other materials which are incorporated by the customary practices and uses.

Whether a particular oral statement is a further term of the contract, depends upon all of the circumstances.

In the ordinary way, it would not be.

Q What was that?

A In the ordinary way it would not be.

Q But there are circumstances where the terms of the contract are determined by what is written on the slip and what information is given to the [438] underwriter and what information is given to him and what information he might be taken to understand as a result of common knowledge?

THE COURT: Plus customs, practices and usage?

THE WITNESS: Yes, yes.

A That is putting it too wide.

I mean what the court is concerned to determine is what was the real contract, the essential contract between the parties, and in the ordinary way that will consist of what is actually written in the slip and what is proved to be additional terms incorporated by ordinary market practices—as you say, ordinary customs, practices and usage.

If the court didn't already take judicial notice, if the party is trying to say that the written document plus the usages and customs don't contain the full terms of the contract, that is rarely the occasion.

The slip is not exhaustive and if the court were satisfied that there was some other term—

THE COURT: Was that exhaustive?

THE WITNESS: Yes.

A If there was some other term which one of the parties in the contract reads too which didn't [439] appear in the slip, then usually what he has got to do in English law or under English law is say, this isn't the complete contract.

The contract should be treated as rectified by addition of whatever the additional term that was agreed upon orally —or if you like, agreed to in some other piece of writing other than the slip.

Q Might that policy if it were eventually issued—

A Oh, that's because the policy is only purported evidence of the contract. The contract is made at the time the slip is signed.

• • • •

[439(2)] MR. TRENT: The remainder of the excess insurer defendants' case consists of about eight paragraphs from the admissions made by the plaintiff which I could cover in the fashion in which it has been done before. If Your Honor wants to shortcut it, perhaps I could have it written up and submitted.

THE COURT: Have it written up and submitted.

MR. TRENT: That's all right with me, Your Honor.

THE COURT: Submit that with your suggested findings of fact and conclusions of law and suggested order on the three issues, and send me a copy of that, please.

MR. TRENT: Certainly. The other thing will be offers of proof on the matter of jurisdiction for five of the excess insurer defendants.

MR. HERSHEY: Your Honor, we discussed on Monday the question of whether jurisdiction is now before the court. I understand that there are three issues before the court, and jurisdiction is not one of them.

MR. TRENT: That's your position, but the Judge said I could make an offer of proof.

THE COURT: He can make an offer of proof. Are they all written up?

MR. TRENT: All written.

THE COURT: Give me a copy of each one of those, too.

MR. TRENT: I will enumerate them.

[439(3)] THE COURT: You ought to identify them first.

MR. TRENT: Mark them as exhibits?

THE COURT: Yes.

MR. TRENT: This is one, offer of proof of the British Reserve Insurance Company, Ltd. The second is the Continental Assurance Company of London, Ltd., and the third one is Trident Insurance Company, and I have the attachments stapled to them.

The fourth one is Vesta (UK) Ltd. The fifth one is Chiyoda Fire & Marine Insurance Company, Ltd., Tokyo.

With that the excess insurer defendants rest.

MR. HERSHEY: Your Honor, I do have a brief rebuttal case, and it will consist of the reading of certain admissions.

THE COURT: How long will this take?

MR. HERSHEY: I imagine 45 minutes or so.

THE COURT: We'll start this afternoon. Have you finished, Mr. Trent?

MR. TRENT: Yes, Your Honor.

MR. HERSHEY: Particularly with respect to these offers of proof, F-1 through F-5, as I read these quickly, their purpose is to show that these five excess insurers do no business or do very little business in Pennsylvania, and I point out to the court that the excess insurers have failed to produce the documents necessary to verify that fact. It was on that basis that the court issued sanctions against them. So I think these offers of proof on jurisdiction are incompetent, and they are not suppported by evidence before the court.

THE COURT: We will overrule you pro forma and let all of these abide the final submission to the court of suggested findings of fact and conclusions of law on the three separate issues.

(Thereupon a recess was had at 12:35 p.m.)

[440] (After recess at 2:00 p.m.)

MR. HERSHEY: Your Honor, I will present further evidence in rebuttal, or in reply, on the forum non conveniens issue.

* * * *

[442] ROBERT W. DOTY, having been called as a witness by the plaintiff, having been duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. HERSHEY:

Q What is your name, please?

A Robert W. Doty.

* * * *

[444] MR. HERSHEY: I have no further questions of the witness.

THE COURT: Mr. Trent.

CROSS EXAMINATION

BY MR. TRENT

* * * *

[447] Q You say in Paragraph 5 that the pretrial discovery has included the production of approximately fifteen thousand documents.

You would agree, would you not, that the vast majority of those would not be used in trial?

* * * *

[448] THE WITNESS: I don't know which of these documents will be used or not used at the trial.

THE COURT: All right.

THE WITNESS: I would expect it would be less than all of them.

BY MR. TRENT:

Q All right.

You cannot say even whether it will be half?

A I don't know what documents will be used at the trial.

Q Now you say that the vast majority of these documents were produced in Pittsburgh or in Guinea?

A Right.

Q Can you tell us which ones were produced in Guinea -and by the way, you were in Guinea, were [449] you not?

A Yes.

Q How many were produced in Guinea?

A I would have to estimate.

Q You haven't counted them?

A No, I haven't counted them.

Q All right. You say all of them are now assembled in Pittsburgh?

A Yes.

Q That is not including those produced in London; you are including them in copies but not originals; is that right?

A (No response.)

Q There were no originals brought to Pittsburgh?

A (No response.)

MR. HERSHEY: Of what?

MR. TRENT: Of documents produced in London'

A I think most of the documents exist in copy form.

* * * *

[452] BY MR. TRENT:

Q Do you know, Mr. Doty, where the originals are?

A The documents I am referring to in Paragraph 5 as far as they relate to London, the documents which were produced in London were authenticated at the depositions taken in London and which have since been brought to Pittsburgh and are along with the deposition transcripts here.

BY MR. TRENT:

Q Are you aware, Mr. Doty, that Excess Insurer Defendants tried to obtain documents from Bland Payne in London and were unsuccessful?

A I am unaware of that.

Q You don't know that?

A No.

Q Have you been told that by anybody in your firm?

A It's my understanding that as far as the Bland Payne file is concerned, counsel for the Excess Insurer Defendants have had that file in its original form and presumably have complete copies of that file.

Q Now isn't that your understanding: that they received a copy of what purported to be the file [453] and made a copy of it and gave it back and then it was given to your firm and you have also made a copy but there is no assurance that it is complete; isn't that right?

A It was always represented to me as being complete.

Q Who represented it to you as being complete?

A Mark Bruckmann.

Q That was as far as he was concerned?

A He thought it was complete, yes. That is what I was told, yes.

Q Who is Mr. Bruckmann; was Mr. Bruckmann the former attorney for Bland Payne?

A Attorney for Excess Insurer Defendants in New York.

Q In these fifteen hundred documents that were produced in London you have not included the files of the Excess Insurer Defendants which were offered to be produced and made available to your firm and your partner Mr. Hershey in London beginning July 2, 1979 at 1:30 o'clock p.m.; were you?

A (No response.)

MR. HERSHEY: What documents were offered at that time?

MR. TRENT: The complete files of all [454] of the Excess Insurer Defendants which I understand contain millions of documents.

MR. HERSHEY: Well, Your Honor, I don't remember such an offer. The question is full of rather vague terms, and I don't think it is capable of being answered. Besides the offer is supposed to have been made to me and not Mr. Doty. I don't know how this witness can reply.

MR. TRENT: I asked whether you knew about those documents, whether they were included in the fifteen thousand.

THE WITNESS: You will first have to ask whether I knew about it.

BY MR. TRENT:

Q Did you know about it?

A No, I am not aware of that.

Q You weren't told by Mr. Hershey that we had offered to produce all of the documents?

A Not told that.

Q Not told that?

A No.

MR. HERSHEY: I can give you my recollection. There was no such offer ever made.

[455] MR. TRENT: Well, I will produce the documents and I will get to that a little later.

• • • •

[474] MR. HERSHEY: I have no redirect.

THE COURT: You may step down.

MR. HERSHEY: While I think of it, also, Your Honor, yesterday during the examination of John Grace, Mr. Grace authenticated an insurance policy issued by the Insurance Corporation of Ireland to CBG.

It was an insurance policy, an aviation policy, which contained a service of suit clause.

It appears as tab 7 to an affidavit which I submitted to this court at an earlier point in previous proceedings.

I would move the admission of that insurance policy at tab 7 and will supply a copy of it to [475] the court.

Mr. Trent already has a copy of it. I would like it to be considered by the court in connection with this hearing in light of the fact that Mr. Grace referred to it in his testimony and admitted it was a policy issued by the Insurance Corporation of Ireland to CBG.

THE COURT: It was sort of hypothetical about some sort of a policy that may have been an airplane policy.

MR. HERSHEY: That is correct.

MR. TRENT: I haven't got precisely the testimony in mind, but whatever objection I made yesterday, I would repeat, and if I didn't make any then, I won't make any now.

THE COURT: Under the circumstances, we will admit it, and it is made part of the record. We will keep an open mind on it.

You will present to Mr. May that in a separate form so it can be separately marked.

MR. HERSHEY: Yes, Plaintiff's Exhibit 9.

The only copy I have is fastened in a book.

THE COURT: Make a note to furnish it tomorrow.

MR. TRENT: I object now. I object to it [476] as irrelevant.

THE COURT: I will overrule you pro forma, and we will consider everything when we read your suggested findings, conclusions, and suggested order and supporting briefs.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPAGNIE DES BAUXITES DE GUINEA, a corporation,
Plaintiff,
v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, All being corporations,
Defendants.

Civil Action
No. 75-1567

PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER IN RE PERMANENT INJUNCTION

I. Preliminary Statement

The issue addressed herein is whether this Court should issue a permanent injunction against the excess insurer defendants prohibiting them from continuing to prosecute the duplicative action which they have filed against the plaintiff in England.

II. Findings of Fact In Re Permanent Injunction

A. The parties and others involved

1. Plaintiff, Compagnie des Bauxites de Guinee, hereinafter abbreviated "CBG", is a Delaware Corporation.

2. CBG is owned 49% by the Republic of Guinea and 51% by Halco (Mining) Inc., hereinafter abbreviated "Halco", a Delaware Corporation, which is licensed to do business in Pennsylvania, and which has its offices at Two Allegheny Center, Pittsburgh, Pennsylvania.

3. Plaintiff has entered into contracts with Halco whereby Halco has performed certain administrative services for plaintiff, including the procurement of insurance, from its office in Pittsburgh.

4. Plaintiff's principal place of business is in the Republic of Guinea, West Africa.

5. Plaintiff is not licensed to do business in the Commonwealth of Pennsylvania.

6. Plaintiff maintains no place of business in the Commonwealth of Pennsylvania.

7. Plaintiff maintains no place of business anywhere in the United States of America.

8. Plaintiff does not do any business in Pennsylvania or elsewhere in the United States.

9. Plaintiff does not maintain any place of business nor do any business in England.

10. Defendant, Insurance Company of North America, hereinafter abbreviated "INA", is a Pennsylvania Corporation having its principal place of business in Philadelphia.

11. The defendants other than INA are twenty insurance companies which write insurance in the London market and one insurance company, L'Union Atlantique S.A. d'Assurances, hereinafter abbreviated "UNAT", which writes insurance in Brussels. Said twenty-one defendants will be referred to as "the excess insurer defendants".

12. The excess insurer defendants are incorporated in the following countries:

Defendant	County of Incorporation
The Insurance Corporation of Ireland Ltd.	Ireland
Eagle Star Insurance Co. Ltd.	England
Hanover Insurance Company	New Hampshire, U.S.A.
Continental Assurance Company of London Ltd.	England
The Century Insurance Co. Ltd.	Scotland

Defendant	County of Incorporation
Yuval, The Insurance Company of Israel, Ltd.	Israel
Home Insurance Company (doing business in England as Home Insurance Co. Ltd.)	New Hampshire, U.S.A.
Slater Walker Insurance Co. Ltd.	England
Yasuda Fire & Marine Insurance Co. (UK) Ltd.	England
Nichido Fire & Marine Insurance Co. Ltd.	Japan
Turegum Insurance Company	Switzerland
Sahar Insurance Co. Ltd.	Israel
Excess Insurance Co. Ltd.	England
Trident Insurance Co. Ltd.	England
Vesta (UK) Ltd.	England
Chiyoda Fire & Marine Insurance Co. Ltd., Tokyo	Japan
Stronghold Insuance Co. Ltd.	England
British Reserve Insurance Co. Ltd.	England
English and American Insurance Co. Ltd.	England
Consolidated Europen [sic] Reinsurance Co. Ltd.	England
L'Union Atlantique S.A. d'Assurances, Brussels	Belgium

13. None of the excess insurer defendants has maintained an office in Pennsylvania.

14. None of the excess insurer defendants has been licensed to do business in Pennsylvania except the following:

Eagle Star Insurance Co. Ltd.	licensed in Pa. until 1978
Hanover Insurance Co.	licensed in Pa.
Home Insurance Co.	licensed in Pa.
Turegum Insurance Company	licensed in Pa. for surplus lines only
Excess Insurance Company	licensed in Pa. for surplus lines only
English & American Insurance Co. Ltd.	licensed in Pa. for surplus lines only.

15. In addition to the twenty-one excess insurer defendants named in finding No. 12, Mercantile & General Reinsurance Co., Ltd., hereinafter abbreviated "Mercantile & General", a corporation incorporated in England and engaged in the insurance business in the London market, was named as a defendant.

16. At some time in 1976, prior to October 26, defendant, The Insurance Corporation of Ireland Ltd., hereinafter abbreviated "ICI", assumed the obligations of Mercantile & General with respect to the excess insurance involved in this action.

17. On October 26, 1976, defendant Mercantile & General was removed from this action and the caption was amended to delete its name.

18. Marsh & McLennan, Inc., hereinafter abbreviated "Marsh & McLennan", has been and is an insurance brokerage concern having offices in Pittsbugh, New York and elsewhere.

19. Bland Payne Company, formerly named Bland Welch & Co. Ltd., hereinafter abbreviated "Bland Payne", has been and is an insurance brokerage concern incorporated in England and engaged in the insurance brokerage business in the London market. It is a Lloyds broker.

B. Events

(a) The Property

20. Prior to 1973, Plaintiff developed and caused to be constructed a mine, railway and processing plant in the Republic of Guinea, West Africa, for the mining, transporting, processing and exporting of bauxite ore. Some of the facilities, in particular, the railway and the port were developed and caused to be constructed by L'Office d'Amenagement de Boke, hereinafter abbreviated "OFAB". This project has been referred to as "The Boke Project".

21. The property in Guinea related to the present action consisted of a bauxite mine at Sangaredi, a railway from Sangaredi to Kamsar, and a processing plant and loading wharves at Kamsar.

22. Plaintiff has been granted certain mining rights by the Government of Guinea to extract bauxite ore in a specified area of Sangaredi. Plaintiff has owned the facilities at Kamsar which crush, dry and store bauxite and which load bauxite into ships. These facilities are hereinafter termed "the processing plant". OFAB has owned the loading wharves at Kamsar.

23. Commercial operations at the Boke project were begun in 1973, although some of the facilities were in operation before that year.

(b) The Insurance

24. In July on August of 1973, Halco, acting on behalf of Plaintiff, instructed Marsh & McLennan to obtain for Plaintiff business interruption insurance covering its operations in Guinea.

25. The amount of such business interruption insurance ultimately requested was $20,000,000.

26. Marsh & McLennan, acting on behalf of plaintiff, requested Bland Payne to obtain business interruption insurance for plaintiff in the London market.

27. In late January and in February, 1974, Bland Payne presented to the excess insurer defendants except for UNAT and to Mercantile & General a placing slip in the amount of $10,000,000, in excess of the first $10,000,000. Said excess insurer defendants (except for UNAT) and Mercantile & General initialed said placing slip, effective February 12, 1974, indicating the part of said $10,000,000 each was willing to insure. A copy of said placing slip, without all the signatures, has been marked defendants' Exhibit "1a".

28. Effective February 12, 1974, UNAT initialed a placing slip sent to it by Bland Payne and returned it to Bland Payne. A copy of said placing slip has been marked defendants' Exhibit "1b".

29. On April 10, 1974, Bland Payne issued in London, and sent to Marsh & McLennan in Pittsburgh, Bland Payne's cover note, and Marsh & McLennan duly delivered said cover note to Halco. A copy of said cover note is attached to Exhibit "2" to the Complaint in the present action.

30. Said cover note recited that Bland Payne had effected business interruption insurance for plaintiff in the amount of $10,000,000, in excess of $10,000,000 with

insurance companies listed on an attachment to the cover note. Said attachment listed the excess insurer defendants and Mercantile & General and specified the percentage of the excess $10,000,000 which each of them had agreed to insure.

C. The American Action

(a) The Pleading and Motions

31. On December 11, 1975, plaintiff filed the present action in two counts, the first against INA on its business interruption insurance Policy No. 71 HF1195 (finding No. 24 supra), and the second against the excess insurer defendants and Mercantile & General on Bland Payne's cover note (finding No. 30 supra), alleging losses to plaintiff from interruption to its business, reducing its output of Bauxite, as the result of failures sustained by the pan feeders and crusherhouse at plaintiff's processing plant at Kamsar during 1974, subsequent to February 12, 1974.

32. Service was made upon the insurance commissioner of the Commonwealth of Pennsylvania, who sent copies of the summons and complaint by certified mail to the Excess Insurer defendants in London and Brussels.

33. In this action CBG alleges that INA and the Excess Insurers agreed to provide all risk business interruption insurance coverage to CBG for certain facilities in Guinea up to $20,000,000 for each loss, that the first $10,000,000 of coverage was written by INA, and the excess layer of $10,000,000 of coverage was written by the Excess Insurers, that while this insurance was in effect in 1974, an incident occurred involving the crusherhouse or the tippler/crusher building which led to a business interruption loss in excess of $10,000,000, and that the loss was covered by the insurance, but the

defendants have refused to indemnify CBG in accordance with the insurance contract.

34. The said INA policy involved in this action is Policy No. 71HF1195, effective as of February 12, 1974, covering certain business interruption losses suffered by CBG up to $10,000,000 for each loss. The INA policy was issued in Philadelphia and was delivered to CBG in Pittsburgh.

35. The Excess Insurers did not issue or execute a policy of their own, but they did execute a placing slip in which they agreed to provide coverage on the same terms and conditions as the underlying INA policy, except that their coverage would be for each loss of $10,000,000, in excess of the underlying $10,000,000 covered by INA.

36. In their Answer filed December 31, 1975, and Amended Answer filed February 17, 1976, the Excess Insurer defendants raised among others the following defenses:

a) Notice of loss was not given, and sworn proof of loss was not submitted within the time required.

b) The alleged loss was not covered by the insurance underwritten.

c) Suit was not filed within the time required.

d) The Court lacks jurisdiction of the subject matter of the action.

e) The Court lacks jurisdiction over the Excess Insurer defendants.

f) The primary damages to the pan feeders and crusher house occurred before the effective date of the insurance and the alleged loss is therefore not covered.

g) The prior damage to the property in question was not revealed by plaintiff to the Excess Insurer defendants prior to or at the placing of the coverage, which serves to eliminate coverage for the loss.

h) The alleged damage to the pan feeders and crusher house was expressly excluded from the coverage.

37. The Excess Insurers filed an Amended Answer on February 17, 1976. In the Amended Answer they challenged this Court's in personam jurisdiction and venue, and they defended themselves on the merits.

38. Among the defenses raised by the Excess Insurers in their Amended Answer was also the defense of nondisclosure. In paragraph 28 of the Amended Answer, the Excess Insurers aver that "prior damage to the property in question was not revealed by the plaintiff to the defendants prior to or at the time of the issuance of the said Policy No. 71HF1195 and cover note, all of which is contrary to the terms, conditions and provisions of the said policy and cover note and all of which serve to eliminate coverage for the alleged loss."

39. On May 20, 1977, the Excess Insurers filed a Motion for Summary Judgment with supporting affidavits. In that Motion seventeen of the twenty-one Excess Insurers alleged a lack of in personam jurisdiction and all twenty-one sought dismissal on the ground of forum non conveniens. After receiving further affidavit and briefs and after receiving evidence and hearing oral argument, the Court denied the Motion for Summary Judgment on April 19, 1979 and confirmed its ruling in an Order dated June 25, 1979.

40. On January 29, 1979, the Excess Insurers filed a second Motion for Summary Judgment. In that Motion

the Excess Insurers challenged the Court's subject matter jurisdiction by alleging a lack of diversity between CBG and INA. INA did not join in the Motion. The Court denied this second Motion for Summary Judgment on April 19, 1979, and confirmed its ruling in an Order dated June 25, 1979.

(b) Plaintiff's Discovery on Personal Jurisdiction over Excess Insurance Defendants.

41. On August 9, 1976, plaintiff served, and on November 19, filed, its first request for documents to each defendant calling in paragraph 7 for, inter alia, "copies of all business interruption insurance policies issued by defendant during the period from January 1, 1972 to December 31, 1975."

42. After the Excess Insurer defendants had on January 24, 1977, objected to producing such policies on grounds of burdensomeness, plaintiff on May 12, 1977, filed a Motion to Compel their production.

43. On June 15, 1978, the Court orally overruled the Excess Insurer defendant's objections and limited other requests to an extent not material to the present controversy.

44. On July 14, 1978, plaintiff served and filed a second request for production of documents by the Excess Insurer defendants seeking "all cover notes and/or insurance policies wherein the Excess Insurer defendants participated as an insurer . . . which . . . were delivered in . . . Pennsylvania . . . or covered a risk located in . . . Pennsylvania." This second request thus asked for part of the documents covered by the first request (finding No. 41 supra), which the excess insurer defendants were already required to produce (finding No. 43, supra).

45. After the Excess Insurer defendants had on July 17, 1978, objected to plaintiff's second request for documents on the ground, inter alia, that they were not in said defendants' possession, custody or control, but were in plaintiff's possession, custody and control. The Court on July 27, 1978, heard argument, and, on being told that the policies were kept by the brokers in London, ordered the Excess Insurer defendants to request them from the brokers. The Court limited them to the period from 1971 to date.

46. On November 24, 1978, the Excess Insurer Defendants served and filed an affidavit offering to make their records, alleged to require review of approximately 4,000,000 files, available at their offices in London for inspection by plaintiff.

47. On November 27, 1978, plaintiff served and filed a Motion to Compel the Excess Insurer defendants to produce the documents relating to their Pennsylvania business since 1971.

48. On December 21, 1978, the Court held a status conference and, after hearing argument, gave the Excess Insurer defendants an additional sixty (60) days to produce the insurance policies which were in the possession of the brokers in London, stating that the Court would assume that he had jurisdiction over defendants unless they produced "statistics and other information in that regard that would indicate otherwise."

49. On February 20, 1979, the Excess Insurer defendants filed copies of their letters to the London brokers asking for the information concerning insurance business written for risks or insureds in Pennsylvania or emanating from Pennsylvania brokers, and copies of the brokers' answers, most of which state that they cannot

extract from their voluminous files the documents requested.

50. On February 23, 1979, plaintiff filed a Motion for an Order denying the Excess Insurer Defendants' Motion to Dismiss for lack of personal jurisdiction over them.

(c) Other Discovery

51. Beginning February 28, 1978, counsel for plaintiff and counsel for defendant INA took a number of depositions of witnesses in Pittsburgh, New York, London and Brussels.

52. Counsel for the Excess Insurer Defendants appeared at said depositions pursuant to orders of court entered February 17, and July 16, 1978, providing that by so doing they did not waive their objections to the jurisdiction of the court or other grounds for dismissal made in their Motion filed May 20, 1977.

53. On November 20 and 21, 1978, counsel for INA took the deposition of Leonard Jacob, Jr., who had been resident manager for plaintiff in Guinea from 1971 until at least 1977.

54. Mr. Jacob testified that problems developed in the pan feeder system and tippler/crusher system in 1973, well before February 12, 1974, the effective date of the business interruption insurance at issue in the present action.

D. The English Action

55. On March 22, 1979, over three years after this subject action was commenced, the Excess Insurers commenced suit against CBG in the High Court of Justice, Queen's Bench Division, at 1979 I No. 1727. In that suit they seek a declaration that they are entitled to avoid the contract of insurance with CBG and Order that the con-

tract of insurance is avoided on the ground of material nondisclosure.

56. In the statement of claim filed in the English action, the Excess Insurers allege that prior to the underwriting they were not told facts which would have shown that the underwriters would be subject to suit in the United States and that they were not told that "from about the beginning of October, 1973, serious problems had developed in the tippler/crusher system at Kamsar which were substantially affecting production."

57. Since at least December 1975, the Excess Insurers have known the facts which they allege in the English action to have been undisclosed prior to the underwriting. The basis for United States jurisdiction over them is asserted in the Complaint. Their Amended Answer shows their awareness of alleged problems with the tippler/crusher system. Nonetheless, they delayed until March 22, 1979, to file the English action which is based upon their allegedly recent discovery of these facts.

58. CGB [sic] does not trade or reside within the jurisdiction of English courts. The Excess Insurers do not allege that CBG derives profits out of England. Nonetheless, the English court authorized the Excess Insurers to serve CBG with process at its statutory office in Dover, Delaware.

E. Duplication in the Two Suits

59. The English action duplicates the American action in that it involves the same parties as Count II of the present case.

60. The English action involves the same insurance contract as that involved in the American action.

61. The English action involves the same subject matter as that involved in the American action.

62. The Excess Insurers take the position in both the English action and the American action that the insurance contract is unenforceable against them because of alleged nondisclosures.

63. In the English action the Excess Insurers seek a "declaration that they are entitled to avoid the Contract of Insurance"; in the American action the Excess Insurers defend on the ground that coverage is "eliminated" because alleged facts were not revealed.

64. The same proof would be required in both the English action and the American action. The Excess Insurers, in both actions, would have to prove that prior to the underwriting certain incidents occurred in Guinea, that those incidents were material to the underwriters, and that they were not told and had no reason to know of the incidents. CBG, in both actions, might present evidence to the contrary on all of these points.

65. The English action, filed on March 22, 1979, duplicates the present action which has been pending in this Court since December 11, 1975.

66. It would be vexatious and harassing to CBG to be forced to litigate regarding the same subject matters in two forums.

67. Further prosecution of the English action would result in economic waste and irreparable injury to CGB [sic].

68. In the English action the case would not be heard by a jury, whereas the Ameican [sic] action involves a jury trial, which was initially sought by CBG.

69. In the English action, the Court is asked to deal only with the issue of nondisclosure, which is one of the issues before this Court in the American action. INA is not a party to the English action. The English Court does not have before it all of the parties, claims and defenses which make up the entire controversy among the parties, as shown by the pleadings and discovery in the American action. Therefore, the complete dispute can be considered and disposed of only in the present case before this Court, not in the English action.

70. The English action represents an attempt by the Excess Insurers to subvert and avoid this Court's jurisdiction, to vex and harass CBG, to deny CBG its rights under the Constitution of the United States, to cause CBG irreparable injury and to have their home forum try issues which have been raised or could have been raised in the action before this Court. Consequently, it must be found that the English action was commenced in bad faith.

III. Conclusions of Law In Re Permanent Injunction

1. This Court has in personam jurisdiction over the Excess Insurers.

Source: Orders of April 19, 1979, and June 25, 1979, which are the law of the case. This Court determined that it has in personam jurisdiction over the Excess Insurers after receiving nine briefs, some thirty-seven affidavits from the Excess Insurers, two days of evidence presented at a hearing, and three oral arguments dealing with the subject. The Court based its finding of in personam jurisdiction on the Pennsylvania long arm statute, on the fact that the Excess Insurers derived profits out of Pennsylvania, on the fact that the Excess Insurers adopted a Pennsylvania insurance contract, on the fact that the Excess Insurers have frequently as a matter of practice authorized the Pennsylvania Insurance Commissioner to accept service of suit in their behalf, on the fact that they have submitted to the jurisdiction in this case, and, as a matter of sanction, on the fact that they failed to produce documents relating to their Pennsylvainia business after being repeatedly ordered to do so by this Court.

2. This Court has the power to enjoin parties within its jurisdiction to desist from prosecuting in other Courts suits which are vexatious and duplicative of actions before this Court.

> (See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 3-7 and authorities cited therein.)

3. The Court's power to enjoin parties from prosecuting duplicative suits includes the power to enjoin further prosecution of suits commenced in other countries, and especially since the litigation in the above-captioned case was begun over four and one half years ago.

> (See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 3-4, and authorities cited therein.)

4. As a matter of law, the English action is duplicative, vexatious, harassing and results in irreparable injury to CBG, and CBG has no other adequate remedy, except injunctive relief.

> (See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 7-11, and authorities cited therein)

5. In the interests of justice and in light of the foregoing findings of fact the Excess Insurers must be enjoined permanently from further prosecuting the Eng-

lish action and any other action which duplicates matters and issues invoved [sic] in the present case before this Court.

IV. Permanent Injunction Order

AND NOW, this 5th day of AUGUST, 1980, in consideration of evidence and arguments presented at hearings before this Court on April 18 and 19, 1979, November 5, 6 and 7, 1979, and April 8, 1980, and in consideration of the Court's findings that the suit instituted by the Excess Insurer Defendants (being all of the defendants with the exception of Defendant Insurance Company of North America) in the High Court of Justice, Queen's Bench Division at 1979-I-No. 1727, over whom this Court has in personam jurisdiction, is duplicative of the present action before this Court, involving the same parties, the same subject matter, the same issues and the same evidence as the case before this Court, and that Plaintiff would suffer irreparable injury if it were forced to litigate both actions simultaneously, and that the interests of justice require that the Excess Insurer Defendants be enjoined from prosecuting the aforementioned suit which they have commenced in London; and adopting and incorporating herein the findings of fact and conclusions of law made by this Court on April 19, 1979; and further adopting and incorporating herein the findings of fact and conclusions of law hereinabove made and entered by this Court simultaneously with the entry of this Order; IT IS HEREBY ORDERED that the Excess Insurer Defendants, their respective attorneys, employees and agents, and each of them, desist from and discontinue any further prosecution of the suit instituted by them in the High Court of Justice, Queen's Bench Division, at 1979-I-No. 1727, and that they desist from filing any other actions in any Court relating in any manner to issues and matters in this action before this Court during the pendency of the present action, and that services of the Order shall be effective upon delivery of a copy of this Order to the Pittsburgh counsel of the Excess Insurer Defendants, and that supplementary service of this Order may be made by the delivery of copies of this Order to the London solicitors of the Excess Insurer Defendants by any competent adult; and that the preliminary injunction entered on April 19, 1979, shall be in full force and effect as to each Excess Insurer Defendant until that Defendant is effectively served with this permanent injunction Order.

PAUL A. SIMMONS
United States District Judge

[W.D. Pa. Title not printed]

NOTICE OF APPEAL

Notice is hereby given that defendants, Insurance Corporation of Ireland, LTD., *et al.* (all defendants above named except Insurance Corporation of North America), hereby appeal to the United States Court of Appeals for the Third Circuit from the order of the District Court entered August 5, 1980 wherein these defendants were permanently enjoined from further prosecuting a lawsuit instituted by them in the High Court of Justice of England, Queen's Bench Division, at 1979-I No. 1727, and from the order of the District Court also entered August 5, 1980, wherein the Court denied these defendants' Motion to Dismiss on grounds of forum non conveniens.

THOMAS P. LAWTON III
Edmund K. Trent

Reed Smith Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania
15219

Thomas F. Weis

Weis & Weis
920 Grant Building
Pittsburgh, Pennsylvania
15219

Attorneys for defendants,
Insurance Corporation of
Ireland, et al.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., MERCANTILE & GENERAL REINSURANCE CO., LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO., LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. & L'UNION ATLANTIQUE S.A. D'ASSURANCES BRUSSELS, all being corporations

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 75-1567)

Argued April 21, 1981

Before: SEITZ, *Chief Judge*,
and ALDISERT and GIBBONS, *Circuit Judges*.

(Filed June 10, 1981)

Edmund K. Trent, Esq. (Argued)
Thomas P. Lawton III, Esq.
Reed Smith Shaw & McClay
P. O. Box 2009
747 Union Trust Building
Pittsburgh, Pennsylvania 15230
Counsel for Appellants

Cloyd R. Mellott, Esq.
Dale Hershey, Esq. (Argued)
Robert W. Doty, Esq.
Jordan S. Weltman, Esq.
Eckert, Seamans, Cherin & Mellott
Forty-Second Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
Counsel for Appellee, Compagnie des Bauxites de Guinea

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The question presented for review is whether the district court erred in enjoining the defendants from pursuing an action in England's High Court of Justice, Queens Bench Division, which sought to rescind excess insurance contracts covering business interruptions of a Delaware corporation doing business in an African country. A threshold inquiry requires us to decide if the district court had jurisdiction over the defendants. We conclude that the court properly exercised personal jurisdiction over eighteen of twenty-one insurance companies and reverse the grant of the injunction.

I.

This is an unfortunate case filed in the district court in 1975 which still admits of no resolution on the merits but bears the scars of over five years of pre-trial skirmishing.[1] The appellee, Compagnie des Bauxites de Guinea (CBG), a Delaware Corporation owned by Halco (Mining), Inc. (51%) and the Republic of Guinea (49%), mines and sells bauxite. CBG operates only in Guinea; it is not registered to do business in Pennsylvania and conducts no business in the United States.

Acting as an agent for CBG, Halco obtained insurance coverage through the Pittsburgh office of Marsh & McLennan, an insurance brokerage firm. The coverage insured against losses up to $20,000,000 from business interruptions caused by breakdowns at CBG's processing plant in Guinea. The Insurance Company of North America, not a party to this appeal, insured the first $10,000,000 of loss; the appellants, a group of twenty-one foreign insurance companies, provided excess coverage of $10,000,000 on contracts issued through a London broker.

As is customary in London, the lead underwriter circulated a "placing slip" among representatives of interested insurance companies indicating the risks to be covered and the total coverage requested. The representatives then initialed the placing slip, indicating the percentage of risk their companies were willing to assume. After the coverage was fully subscribed the London broker prepared a "cover note" listing briefly the details of the risk and the premium. An actual policy is seldom issued at this stage and none was issued here. Instead, the excess insurers adopted the form of the INA policy "as far as applicable." App. at 136a.

Because of damage to its bauxite crushing plant, CBG presented a claim on its insurance coverage and the insurers refused to pay. CBG filed a complaint in December, 1975, in the Western District of Pennsylvania against all the insurance companies, asserting jurisdiction based on diversity of citizenship. 28 U.S.C. §1332(a). Almost four years later, while still participating in the pre-trial stages of this case, the excess insurers filed suit in England on March 22, 1979, seeking to rescind the excess insurance contract alleging that CBG failed to disclose material facts relating to the contract. CBG then moved the district court to enjoin the carriers from pursuing the English suit on the ground that it raised issues identical to those in the case at bar. After a hearing, the district court granted the motion, providing the order that is the subject of this appeal under 28 U.S.C. §1292(a)(1).

---

[1] The insurers have unsuccessfully appealed various aspects of the present case to this court on two previous occasions. No. 79-1511 (dismissed July 2, 1979) (motion to dismiss); No. 79-1513 (denied April 30, 1979)(stay of preliminary injunction).

II.

A district court must have personal jurisdiction over a party before it can enjoin its actions. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 112 (1969). The lack of jurisdiction is the initial question raised by the excess insurers.[2] The district court found personal jurisdiction under two independent theories. First, it held that the appellants' activities placed them within reach of the Pennsylvania long-arm statute. 42 Pa. Cons. Stat. Ann. §§8301-8311 (repealed June 27, 1978; current version at 42 Cons. Stat. Ann. §5322). Alternatively, the district court took as established, pursuant to Fed. R. Civ. P. 37(b)(2)(A), that it had personal jurisdiction as a sanction for the insurers' failure to comply with the court's order compelling discovery. The rule provides that "[i]f a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make . . . [a]n order that . . . designated facts shall be taken to be established for the purposes of the action. . . ."

---

[2] Seventeen of the twenty-one insurers appeal from the finding of lack of in personam jurisdiction. App. at 81a. Eagle Star Insurance Co., Ltd., Hanover Insurance Co., Home Insurance Co., Ltd., and Turegum Insurance Co., Ltd. concede personal jurisdiction. All of the insurers appeal from the order granting the permanent injunction as well as the denial of the motion to dismiss for *forum non conveniens*.

A defendant's challenge to the court's in personam jurisdiction imposes on the plaintiff the burden of "com[ing] forward with facts, by affidavit or otherwise, in support of personal jurisdiction." *DiCesare-Engler Productions, Inc. v. Mainman Ltd.*, 81 F.R.D. 703, 705 (W.D. Pa. 1979); *see also Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). CBG had the ultimate burden of proving that the activities of the insurance companies brought them within the scope of the Pennsylvania long-arm statute.

The long-arm statute sets forth two independent tests for the assertion of in personam jurisdiction over foreign corporations. A court may exercise jurisdiction over a foreign corporation found to be doing business in Pennsylvania as the statute defines doing business. Alternatively, the assertion of jurisdiction over a foreign corporation is permitted so long as that assertion does not contravene the due process clause prohibition against assertions of jurisdiction that "offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Myer*, 311 U.S. 457, 463 (1940)); *see generally World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Only minimal contacts with the forum state are required to satisfy due process. *See McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957); *Aldens, Inc. v. Packel*, 524 F.2d 38, 42-44 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

III.

CBG sought by means of discovery to obtain evidence to meet its burden of proving either that the insurers were doing business in Pennsylvania or that there were sufficient contacts to satisfy due process. On August 9, 1976, it began what was to become a three-year discovery odyssey by serving a request on each defendant for copies of all business interruption insurance policies issued between January 1, 1972 and December 31, 1975, as well as all documents related in any way to the claim being made here. App. at 66a-69a. The carriers objected to the discovery request on January 24, 1977, claiming that compliance "would be extremely expensive and burdensome." *Id.* at 72a. CBG responded on May 12, 1977, by filing a motion to compel production. *Id.* at 74a. Over a year passed before the district court ruled on CBG's motion and ordered the excess insurers to produce the relevant documents. *Id.* at 515a-16a. During the interim, the insurance companies pressed their claim that the court did not have personal jurisdiction but did not relate that claim to the discovery order.

On May 20, 1977, seventeen of the twenty-one excess insurers filed a motion for summary judgment, contending that the complaint should be dismissed because the district court lacked personal jurisdiction over them. *Id.* at 78a-86a. According to the allegations of the motion and the supporting affidavits, none of these insurance companies was organized, licensed, or authorized to do business under the laws of Pennsylvania.[3] The excess insurers therefore concluded that the exercise of personal jurisdiction over them would constitute "a clear-cut violation of due process." *Id.* at 81a.

In an affidavit opposing the motion for summary judgment, CBG claimed that between 1971 and 1975, various excess insurers had participated in at least ten insurance contracts connected with CBG's operations in Guinea wherein the insurers agreed to be subject to suit in the United States. *Id.* at 172a-73a. A second affidavit contains a more general list of the contracts involving CBG and each of the excess insurance companies in which the Pittsburgh office of Marsh & McLennan acted as CBG's agent. *Id.* at 177a.

---

[3] Two of the insurance companies questioning the district court's in personam jurisdiction, Excess Insurance Co., Ltd. and English & American Insurance Co., Ltd., are registered as surplus line carriers in Pennsylvania, Pa. Stat. Ann. tit. 40, §1006.6, and have designated agents for service of process, *id.* at §1006.8. They argue that these facts should not distinguish them from the other fifteen insurers. We do not find it necessary to address that argument.

Recognizing, however, that the full extent of the insurers' contacts with Pennsylvania could only be determined by examining the insurers' records, CBG renewed its request for the production of "all cover notes and/or insurance policies wherein any of the excess insurer defendants participated as an insurer . . . which . . . were delivered in . . . Pennsylvania and/or covered a risk located in . . . Pennsylvania." *Id.* at 194a. This request of July 14, 1978, narrowed CBG's earlier discovery request of August 9, 1976, to encompass only policies with some logical relationship to Pennsylvania. The excess insurers again objected on the ground that the request included documents beyond the legitimate scope of discovery and that the request was unduly burdensome and oppressive. *Id.* at 195a-96a.

On July 27, 1978, the district court attempted to resolve the motions for production of documents by ordering the insurance companies to "furnish the names of the policies and the numbers and sort of a general outline of the policies, not in detail, of all the [Pennsylvania related] policies they [had] written from 1971 to date." *Id.* at 516a; *see* Fed. R. Civ. P. 37(a). Counsel for the carriers argued that obtaining the policies was no simple task because the policies would be available only in the files of London brokers. To satisfy CBG's request, "over 150 London brokers" would have to search through "hundreds of thousands of documents." App. at 517a. The district court found, however, that the request was not burdensome and that the process could be expedited by contacting the brokers immediately through form letters. *Id*. at 518a. The court granted the excess insurers' request for ninety days in which to comply with the order.

The insurers never questioned the district court's power to order production of their records. They recognized that the court had jurisdiction to determine whether it could properly exercise personal jurisdiction over them and therefore that it could compel discovery to aid in the resolution of that issue. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 n.5 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979); *In Re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1151 (N.D.Ill. 1979).

By October 25, 1978, the insurance companies were in violation of the order and asked for an additional thirty days to comply, representing to the court that "[c]ounsel has sought to secure the information necessary to answer plaintiff's interrogatories and *will probably be able* to complete the answers within thirty days from this date."[4] App. at 309a. (emphasis added). The court again granted their request. Although the excess insurers still had not produced any of the requested documents, the district court granted a final extension on December 21, 1978, giving the carriers until February 21, 1979, to comply with the discovery order. When granting the extension, the court warned the excess insurers that failure to produce the requested documents within this additional sixty days would result in the imposition of a sanction under Fed. R. Civ. P. 37(b)(2)(A) consisting of a finding of in personam jurisdiction. *Id*. at 542a.

At the close of the sixty day period, the excess insurers had produced only a few of the documents requested. The record indicates that no request that the English brokers forward the relevant policies was made until

---

[4] In answering the insurers' motion for an extension, CBG noted that no interrogatories remained unanswered. App. at 316a. We agree, and assume that the excess insurers and the district court, in granting the motion, were referring to the order to produce documents.

January 1979. *Id.* at 337a. This modest attempt to comply with the court order was not begun until long after the ninety day period the excess insurers requested in July 1978, and at least two months after their counsel represented to the court in Pittsburgh that the material would be forthcoming within thirty days. These facts make it difficult to conclude that the excess carriers made a good faith effort to comply with the court's orders of July 27, 1978 and November 8, 1978. It is one thing not to produce discovery material on time; it is quite another thing not even to begin to produce it.

On April 19, 1979, the district court "impose[d] a sanction consisting of a finding that the Excess Insurers are subject to the in personam jurisdiction of this Court because of their business contacts in Pennsylvania." *Id.* at 667a; *see* Fed. R. Civ. P. 37(b)(2)(A). The sanction was carefully limited to the action before the court; only the facts necessary to exercise personal jurisdiction were taken as established. *See English v. 21st Phoenix Corp.*, 590 F.2d at 728.

One month earlier, the excess insurers had filed suit in the High Court of Justice in London seeking to rescind the underlying insurance contract with CBG, contending that CBG had misrepresented material facts concerning the subject matter of the coverage. CBG then moved that the district court enjoin the insurers from pursuing the English action, claiming that it involved the same issues as the present case and was filed merely to harass CBG. App. at 342a-45a. Concluding that the English suit was duplicative, the district court granted CBG's motion for a preliminary injunction, App. at 674a, and on August 5, 1980, permanently enjoined the insurers from pursuing the English action during the pendency of the present case. *Id.* at 476a-77a.

IV.

The insurers attempt to justify their failure to produce the requested documents, arguing that they complied with the discovery order of the district court by offering to make the documents available for inspection by CBG at their home offices in London and Brussels. We are not persuaded by this argument.

As a general principle, a trial court has discretion to order one party to produce its records for another party during discovery. Fed. R. Civ. P. 34; *see, e.g., Jacobs v. Kennedy Van Saun Mfg. & Eng. Co.*, 12 F.R.D. 523 (M.D.Pa. 1952). In certain situations, however, a court may force the requesting party to inspect the documents at the convenience of the party who possesses them. *Gielow v. Warner Bros. Pictures*, 26 F.Supp. 425, 426 (S.D.N.Y. 1938); *cf.* Fed. R. Civ. P. 33(c) (When the answer to an interrogatory is contained in business records, and the burden of ascertaining the answer is substantially the same for both parties, the respondent may answer by specifying the relevant records and allowing an opportunity to examine them.)[5] Generally, inspection is required when the requested material is so voluminous that copying and transporting it would prove unduly burdensome and oppressive, *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F.R.D. 388, 389 (S.D.N.Y. 1940), or where the distance between the parties is great. *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25 (D.C. Cir. 1947); *see also Lundberg v. Welles*, 93 F.Supp. 359 (S.D.N.Y. 1950); *Harris v. Sunset Oil Co.*, 2 F.R.D. 93 (W.D. Wash. 1941). Here, the district court specifically found that CBG's request for documents was not burdensome, App. at 516a, 518a, and it was likewise unimpressed by the excess insurers' complaints that they would have to contact hundreds of London brokers. *Id.* at 517a. On the record before us, we cannot conclude that these findings were erroneous, and thus it was well within the trial judge's discretion to order that the necessary documents be brought to Pittsburgh for examination by CBG instead of requiring CBG to inspect the records at the home office of each of the twenty-one insurance companies.

---

[5] *See, e.g., Mid-American Facilities, Inc. v. Argonant Ins. Co.*, 76 F.R.D. 497 (E.D. Wisc. 1978); *Haykel v. G.F.L. Furniture Leasing Co.*, 76 F.R.D. 386 (N.D. Ga. 1976).

Moreover, the excess insurers' offer to permit home office inspection was made quite late in the proceedings. They did not make the offer of home office inspection when they replied to the original request for the documents that was made on August 9, 1976, or during the July 27, 1978 hearing at which they requested an additional ninety days to comply, or when they asked for a thirty day extension on October 25, 1978, or when they received a sixty day extension on December 21, 1978. When they finally made the offer on November 24, 1978, it was neither included in any of the answering papers in the discovery proceeding nor was it made during any of the hearings. Instead the offer was tucked away in an affidavit filed by the insurers' New York counsel supporting the summary judgment motion. *Id.* at 312a. At the same time that the excess insurers' New York counsel was offering to permit inspection, their Pittsburgh counsel was promising the court that their clients would comply with the discovery order if only given more time. *Id.* at 309a. Indeed, the Pittsburgh counsel did not begin to rely on the offer for home inspection until June 1979, two months after the district court applied sanctions and issued the preliminary injunction.

Thus, in our view this is not the garden variety geographic conflict about whether the mountain should come to Mahomet or vice versa.[6] Rather, we perceive the appellants' offer to provide home office inspection as a defense strategy that simply comes too late in these unduly protracted pre-trial proceedings to be of major significance in reviewing the imposition of sanctions by the district court.

---

[6] *See* F. Bacon, Essays: Of Boldness (1597).

V.

We will reverse a sanction imposed pursuant to Fed. R. Civ. P. 37 (b)(2) only if the district court abused its discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (per curiam); *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781, 788 (3d Cir. 1974). Discretion as a jural concept admits of some lack of precision, and formal definitions of the concept are only the inception and not the fruition of understanding. We agree with Professor Dworkin that discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction.[7] At best, this means that legislative or judicial authority should provide guidance to both the exerciser and the reviewer by defining with some specificity the permissible outer limits of the exercise of discretion.

The Federal Rules of Civil Procedure offer some guidance regarding the limits on the district court's power to impose sanctions. Rule 37(b) specifies two limitations. It states that the district court "may make such orders in regard to the failure [to obey an order compelling discovery] as are just," and it lists specific sanctions that, "among others," are contemplated by the rule. The order before us here easily satisfies both limits of discretion specified by the rule. Case law instructs that the district court's decision must be rationally related to the reasons given and the requirements of the rule. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. We are aided here by the trial court's explanation of the factors that led to its decision.[8] An appellate court is not free to substitute its judgment for that of the trial court, because the rules have invested the court of first instance with the expression of that judgment. *See DiGregorio v. First Rediscount Corp.*, 506 F.2d at 788. The review function is not plenary; to disturb the exercise we must find an abuse of authority, not merely the presence of an alternative reasonable choice. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642.

---

[7] R. Dworkin, Taking Rights Seriously 31 (1977); *see generally United States v. Criden*, —— F.2d ——, ——, No. 80-2622 (3d Cir. April 20, 1981), slip op. at 7-11.

---

[8]

To show the full extent of the business done by the Excess Insurers connected with Pennsylvania, this Court, on July 27th, 1978, ordered the Excess Insurers to produce all insurance contracts which they had written since 1971 in which they provided coverage to Pennsylvania insureds, including Pennsylvania risks, or provided coverage through Pennsylvania brokers.

The Excess Insurers, through their attorneys, promised on several occasions to comply with this Court's order, and obtained extensions of time in order to comply. The Excess Insurers produced only a few of the insurance contracts requested and under the circumstances the Court feels that the Excess Insurers have not offered the necessary assistance to the various brokers in gathering documents and getting the requested information which would be necessary under the circumstances.

This Court, after some months of further delay, on December 21st, 1978, stated that if the Excess Insurers were to fail to produce the requested information within 60 days from that date, the insurance contracts, which were subject to its order of July 27, 1978, and showing the extent of the business contacts with Pennsylvania, that this Court would impose a sanction consisting of a finding that the Excess Insurers are subject to the in personam jurisdiction of this Court because of their business contacts in Pennsylvania. . . .

[T]he Court finds, as a fact, that the material promised this Court by the Excess Insurers on December 21st, 1978, and prior to that time on July 27th, 1978, . . . has not been forthcoming, and the Court, at this point, will rule and impose a sanction, and does find that the Excess Insurers are, in fact, subject to the in personam jurisdiction of this court.

Id. at 666a-668a.

On the record before us, we are persuaded that the trial court did not exceed appropriate limits of its authority. The excess insurers negligently or deliberately flouted the district court's order compelling discovery. For over six months after the order was first issued, the insurers represented to the court that they were attempting to comply with the order. But the insurers did not even attempt to implement the court's order until January 1979, several weeks after being warned that failure to comply would force the court to impose sanctions. The English brokers were given less than a month to gather the documents, and later indicated that given sufficient time they could have complied with the discovery order. App. at 1303a, 1308a-10a, 1330a. In addition, the insurers produced none of their own records consisting of indexes and placing slips. The district court imposed the sanction in response to the excess insurers' dilatory conduct in dealing with the court throughout the discovery proceedings. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 640, 643; *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (per curiam).

The excess insurers argue, however, that the district court could only enter the sanction of denying the motion to dismiss for lack of subject matter jurisdiction, but could not "[take] as established for the purposes of the action" that appellants had sufficient contacts with the forum state to justify its exercise of in personam jurisdiction. We reject this argument. The purpose and scope of the ordered discovery were directly related to the issue of jurisdiction and the rule 37 sanction was tailored to establish as admitted those jurisdictional facts that, because of the insurers' failure to comply with discovery orders, CBG was unable to adduce through discovery. This was an appropriate exercise of the district court's discretion. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979).

We recognize that in *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, —— U.S. ——, 49 U.S.L.W. 3856 (May 18, 1981), the Fifth Circuit's position appears to be to the contrary, but we find ourselves in disagreement with that case. As long as discovery orders are permissible in aid of the jurisdictional determination, we think it fairly follows that a district court may respond to noncompliance by the party resisting a finding of jurisdiction with an appropriate rule 37(b)(2)(A) sanction. The availability of such a sanction is particularly important when, as here, the very material sought to be discovered — the defendants' contacts with the forum state — will normally be in the possession of a defendant and will frequently be unknown to a plaintiff. The district court's decision to take as established for purposes of this action that the insurers had sufficient minimum contacts with Pennsylvania, in response to the insurers' failure to comply with discovery orders issued to determine the existence of such contacts, was an appropriate exercise of its discretion under rule 37(b)(2)(A).

Furthermore, there is no question of the insurers having been unfairly surprised by imposition of the sanction. The district court gave ample warning of the sanction it would impose. *See* App. at 542a; *see also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. Jurisdictional issues should not delay the proceedings before a court more than necessary, and personal jurisdiction in particular is best settled at the outset of litigation if the judicial system is to operate efficiently and without diluting the quality of justice. *See Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, 528 F.2d 911 (3d Cir. 1976) (per curiam). We conclude that the district court's order was a proper application of Rule 37(b)(2)(A) that the designated facts "shall be taken as established for the purposes of the action. . . ."

Having concluded that the court did not abuse its discretion under the rule, the only remaining limitation on imposition of sanctions is the due process clause of the Constitution. The sanction did not violate the fifth amendment due process rights of the excess insurers. As this court has observed, "[o]nly where the sanction invoked is more stern than reasonably necessary does a denial of due process result." *DiGregorio v. First Rediscount Corp.*, 506 F.2d at 789; *see generally Societe Internationale v. Rogers*, 357 U.S. 197, 209-11 (1958). Here, the sanction was carefully tailored to fit the situation; only the facts necessary to establish the minimum contacts needed to justify personal jurisdiction in this action were taken as established pursuant to the sanction.

Accordingly, we will not disturb the discretion exercised by the district court in determining that the excess insurers were subject to the personal jurisdiction of the court because their business contacts in Pennsylvania were deemed established as a sanction for failure to make discovery.[9]

---

[9] Because of the view we take, it is not necessary to consider the other arguments advanced by the insurers, nor is it necessary to meet the district court's alternative determination that, based on the evidence before it, the excess insurers' activities did in fact constitute doing business in Pennsylvania.

We do not overlook the reality that CBG's contention that the excess insurers did do business in Pennsylvania was not fanciful. By affidavit dated March 19, 1979, CBG presented 24 insurance policies and cover notes reflecting coverage written for CBG between 1972 and 1977, in which various excess insurers participated. App. at 2010-2500. The policies were delivered to CBG in Pittsburgh at the office of Halco (Mining) Inc. Eighteen of the policies and cover notes are dated prior to the filing of the law suit here. In these policies the insurers agree to be subject either to the jurisdiction of American courts or to arbitrate policy disputes here.

VI.

Three of the excess insurers, Chiyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels, complied with the discovery order by filing affidavits stating that they had issued no policies covering risks located in Pennsylvania or associated with either CBG or the Pittsburgh office of Marsh & McLennan. App. at 236a, 493a, 323a. The sanction imposed by the district court because of the other insurers' failure to produce the requested documents should not apply to these three companies. In addition their contacts with Pennsylvania are simply inadequate to justify the exercise of personal jurisdiction pursuant to the Pennsylvania long-arm statute. The record discloses no evidence that these companies deliberately availed themselves of the privilege of doing business within the state, or indeed that they had any contacts that would justify a reasonable expectation of being haled into court there. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

We therefore will reverse the district court's determination that it had personal jurisdiction over Chiyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels and direct dismissal of the complaint with respect to them.

VII.

We now turn to the order enjoining the excess insurers from maintaining the action commenced by them in London. The general principle established "[e]arly in our history," is that one court will not interfere with or try to restrain proceedings in another in an ordinary action in personam. *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).[10] "[W]here the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939). This principle has often been applied in cases similar to the present case where one of the actions is in a foreign jurisdiction. *See Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969).

---

[10] The principle applied here does not contradict the "first-filed rule" established in *Crosley Corp. v. Hazeltine Corp.*, 122

In *Donovan*, the Supreme Court applied this general principle notwithstanding the lower court finding that the second action was harassing and vexatious. *See* 377 U.S. at 415 (Harlan, J. dissenting). Thus, the district court's finding that the action instituted in the English courts was duplicative, and therefore harassing and vexatious, does not affect our decision. Likewise, there is no difference between addressing an injunction to the parties and addressing it to the foreign court itself. *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849); *see also O'Hare International Bank v. Lambert*, 459 F.2d 329, 331 (10th Cir. 1972). Enjoining the parties necessarily affects the court and compromises "the comity which the federal courts owe to courts of other jurisdictions." *Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.*, 412 F.2d at 578.

F.2d 925 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942). The first-filed rule provides that when similar cases have been filed in different federal district courts, "it [is] the duty of the court first obtaining jurisdiction to enjoin the prosecution of the subsequent proceedings in the other court." *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp.*, 125 F.2d 1008, 1009 (3d Cir.), *cert. denied*, 316 U.S. 676 (1942); *see also Berkshire International Corp. v. Marquez*, 69 F.R.D. 583 (E.D.Pa. 1976). The rule has never been applied, and in fact it was never meant to apply where the two courts involved are not courts of the same sovereignty. *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d at 929. Restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore "requires that such action be taken only with care and great restraint." *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

We do not determine that the district court lacks the power to enjoin parties from pursuing an action in another jurisdiction in every case. It is sufficient here to hold that the district court abused its discretion when it enjoined an action seeking a declaratory judgment in the courts of another sovereign. In the present case, duplication of issues and the insurers' delay in filing the London action were the sole bases for the district court's injunction, and we hold that these factors alone did not justify the breach of comity among the courts of separate sovereignties.

Accordingly, we will reverse the order granting a permanent injunction restraining the insurers from further prosecution of the suit instituted by them in England in the High Court of Justice, Queen's Bench Division.

VIII.

Finally we address the order denying appellants' motion to dismiss on the basis of *forum non conveniens*. "[D]enial of a motion to dismiss, even when the motion is based on jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945). *See Fleming v. Berardi*, 441 F.2d 732 (3d Cir. 1971); *Commonwealth v. Brown*, 373 F.2d 771, 776 (3d Cir. 1967). Agreeing with Judge Maris, we believe that "little need be said"[11] and conclude that the order denying dismissal on the basis of *forum non conveniens* was inherently interlocutory since it did not terminate any phase of the litigation. Therefore, because it is not appealable under 28 U.S.C. §1291 as a final order and because no provision of 28 U.S.C. §1292 is applicable, we will dismiss the appeal on this issue for lack of jurisdiction.

---

[11] *Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.*, 506 F.2d 735. 742 (3d Cir. 1974).

IX.

For the reasons heretofore set forth, we will reverse the judgment of the district court issuing the injunction on August 5, 1980, and remand the cause for further proceedings in accordance with the foregoing.

GIBBONS, *Circuit Judge*, dissenting in part:

My difference with the majority is narrow. I join in part VI of the opinion of the court holding that there is no personal jurisdiction over Chioyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels. I also join in part VII, reversing the injunction against prosecution of the suit instituted by the excess insurers in the High Court of Justice, Queens Bench Division.

Moreover, I agree that under the controlling case law in this circuit a denial of a motion to dismiss on *forum non conveniens* grounds is not ordinarily immediately reviewable. I disagree with the conclusion in Part VII of the opinion of the court that that rule is controlling here, however, for several reasons. First, it seems clear that the *forum non conveniens* contention bears directly upon the propriety of the issuance of an injunction against prosecution of a parallel suit in London, and thus may properly be considered in connection with the disposition of the appeal from that injunction. We review the court's decision to exercise in personam jurisdiction by virtue of 28 U.S.C. §1292(a)(1). I see no distinction between reviewing that decision, otherwise interlocutory and unreviewable, and reviewing the decision refusing to dismiss on *forum non conveniens* grounds. The facts bearing upon a determination of adjudication competence for purposes of the due process clause and those bearing upon whether or not the chosen forum is excessively inconvenient may not be identical, but they certainly overlap to a large extent. Moreover both a decision to deny a Rule 12(b)(1) motion and a decision to deny a *forum non conveniens* motion would, if not reviewed at the outset, remain subject to review after final judgment. It makes no sense to me to leave this case in the posture in which one of two grounds which might after final hearing result in a dismissal is decided and the other left open. Even if this were an interstate rather than an international problem that result would be unsatisfactory, since it leaves open the possibility that a panel which later reviews the case may conclude that the trial should never have been held in Pennsylvania. In an international context the case for review now is even stronger, since even if a panel should later agree that Pennsylvania was a convenient forum, Great Britain need not afford that decision full faith and credit. Of course, had no injunction issued, neither ground for dismissal would be reviewed. But since 28 U.S.C. §1292(a)(1) permits review, we should consider and decide any ground which could be asserted against the propriety of injunctive relief. Certainly an injunction prohibiting trial in a more convenient forum would be error. Since, however, the majority has declined to review the *forum non conveniens* decision, and the record after final hearing on that issue may not be identical, it seems appropriate that I, too, decline at this time to express an opinion of its merits.

In Parts IV and V, the opinion of the court takes as established the jurisdictional facts supporting in personam jurisdiction, by virtue of a sanction imposed under Fed. R. Civ. P. 37(b). I disagree with the majority's conclusion that there was no abuse of discretion in imposing that sanction. The majority resorts to pejoratives such as "defense strategy" to characterize defendants' offer to permit inspection of voluminous documents in London rather than in Pittsburgh, and finds fault with the timing of that offer. But that argument ignores the foreign excess insurers' initial pleading that the Western District of Pennsylvania lacked personal jurisdiction to order them to do anything. Asserted from the outset, that position was never abandoned.

More significantly, the majority maintains the sanction was not an abuse of discretion because it "was carefully tailored to fit the situation; only the facts necessary to establish the minimum contacts needed to justify personal jurisdiction in this action were taken as established pursuant to the sanction." Slip op. at 15. *See also*, slip op. at 14. But the majority errs in characterizing the district court's exercise of personal jurisdiction as an example of minimum contacts, or specific, jurisdiction. The majority has "confounded specific jurisdiction to adjudicate claims linked to activities occurring or having an impact in the forum state, and general, 'all purpose' adjudicatory authority to hear and decide claims totally unconnected with the forum." *Donahue v. Far Eastern Air Transport Corp.*, —— F.2d —— (D.C. Cir. No. 80-1243, April 22, 1981, slip op. at 4). The district court exercised not specific, but general jurisdiction over the excess insurers. *See* App. 666-68. Specific and general jurisdiction analyses are quite distinct. *See generally* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966). The former inquires into minimum contacts; the latter mandates not minimal, but continuous and substantial forum affiliation.

As the Supreme Court enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316-19 (1945), minimum contacts analysis applies to the "single or occasional acts" of a nonresident defendant within a state when the suit concerns those acts, but not when the suit concerns matters unrelated to the forum activities. Moreover, the Supreme Court has repeatedly emphasized that in order to sustain assertion of specific jurisdiction, the plaintiff must show that the nonresident defendant's single or occasional acts within the forum state which gave rise to the claim manifest defendant's "purposefully availing itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Shaffer v. Heitner*, 433 U.S. 286 (1977); *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). Plaintiff's unilateral act within the forum state is insufficient to confer personal jurisdiction over the nonresident defendant. Similarly, defendant's fleeting or fortuitous forum connection lacks the requisite element of intentional invocation of the forum's benefits. Examination of the relevant transactions in this case reveals that the only contact the excess insurers had with Pennsylvania concerning this claim is too attentuated to meet the requirements of *Hanson v. Denckla* and its progeny. That contact amounts to a phone call placed by CBG's parent corporation's broker from Pittsburgh to Bland, Welsch in London requesting the London firm to secure agreements with foreign insurers in London to cover an African risk.

As a general rule, mere placing of a phone call by defendant into the forum state does not constitute "purposeful availing." *See, e.g., Covington Industries Inc. v. Resinex, Inc.*, 629 F.2d 730 (2d Cir. 1980) (defendant's telexes to Georgia from Switzerland concerning delivery of goods to Haiti do not constitute "transacting business" under the liberally interpreted Georgia long-arm statute); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (use of the telephone does not constitute purposeful activity under the fourteenth amendment due process clause); *Aaron Ferer & Sons Inc. v. Diversified Metals Corp.*, 564 F.2d 1211 (8th Cir. 1977) (defendant's phone call to Nebraska from Michigan concerning a Michigan contract does not constitute purposeful activity in Nebraska); *Northeast Timber Inc. v. Pines Trailer Corp.*, 501 F. Supp. 321 (E.D. Pa. 1980) (defendant's phone calls to Pennsylvania from Illinois do not constitute purposeful activity in Pennsylvania). It follows all the more forcefully that *plaintiff*'s or plaintiff's agent's phone call *from* the forum state concerning an out-of-state transaction does not draw defendant into invoking the forum state's benefits. *See, e.g., McBreen v. Beech Aircraft Co.*, 543 F.2d 26 (7th Cir. 1976) (out-of-state defendant's remarks in interstate phone call placed by plaintiff from the forum state do not constitute purposeful activity by defendant in the forum state); *Galaxy International, Inc. v. White Stores Inc.*, 88 F.R.D. 311 (W.D. Pa. 1980) (Pennsylvania company's phone call from Pennsylvania to defendant in Tennessee resulting in a contract to purchase beef from outside Pennsylvania is not purposeful activity in Pennsylvania).

Hence, given the undisputed facts bearing on specific jurisdiction, assertion of such jurisdiction based on the excess insurers' alleged minimum contacts with Pennsylvania would have been inappropriate. *International Shoe*, however, delineated another category in which assertion of personal jurisdiction over a nonresident defendant may be permissable. This is the general, or "all purpose" jurisdiction classification. It applies to claims *unrelated* to the forum, when the nonresident's contacts are "continuous" and "substantial."

> While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

326 U.S. at 318 (citations omitted).[1] *Bork v. Mills*, 458 Pa. 228, 231-32, 329 A.2d 247, 249 (1974); *Whalen v. Walt Disney World*, 418 A.2d 389, 391-92 (Pa. Super. 1980). *See also* Restatement 2d of Conflicts §47(2).

In order to maintain personal jurisdiction over the excess insurers, then, CBG must show that all the foreign excess insurers engaged in continuous and substantial business in Pennsylvania. In imposing personal jurisdiction by Rule 37 sanction, the district court therefore took as established not isolated contacts supporting the exercise of specific jurisdiction, but major "continuous corporate operations" in Pennsylvania by each excess insurer. By their nature, the facts requisite to asserting general jurisdiction cannot be "carefully tailored"; they must be extensive and pervasive.[2] The facts before the district court indicated that some of the excess insurers had entered into other contracts in which they agreed to be subject to suit in Pennsylvania or other United States jurisdictions. Standing alone, these contracts do not satisfy the continuous and substantial forum affiliation test.[3] In order to assert general jurisdiction, the district court was obliged to assume that these contracts were but a small part of a persistent pattern of sizeable business dealings with Pennsylvania insureds, or covering Pennsylvania risks. The necessarily broad scope of the jurisdictional facts the district court assumed, over defendants' denial, and without placing the burden of discovery on plaintiff, was an abuse of discretion.

---

[1] The Supreme Court has only once, since *International Shoe*, upheld the exercise of this category of personal jurisdiction. That decision, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), was something of an anomaly. The forum most connected with the defendant and with the disputed transaction was not Ohio, where plaintiff brought suit, but the Philippines, which at the time were under Japanese occupation. At the time, Ohio was the most related American forum. *Perkins* is arguably a jurisdiction by necessity decision. *See* Von Mehren & Trautman, *supra*, 79 Harv. L. Rev. at 1144 ("the *Perkins* decision should be regarded as a decision on exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction"). Von Mehren and Trautman argue that, "aside perhaps from the possibility of *limited* general jurisdiction based on the location of assets," specific jurisdiction should wholly supplant general jurisdiction. *Id.* (Emphasis in original).

[2] Pennsylvania decisions elaborating the "continuous and substantial" standard indicate a very high threshold of business activity. *See, e.g.*, *Bork v. Mills*, *supra* (uncontroverted allegation that defendant hauled freight within Pennsylvania insufficient to meet continuous and substantial test), *compare* Scanapico v. Richmond, Fredricksburg & Potomac R. Co., 439 F.2d 17 (2d Cir. 1970) (en banc) (freight solicitation in forum by two employees, sale of tickets, and daily presence in forum of defendant's freight cars on trains operated by other carriers meets "doing business" test under New York service of process statute); Lebkuecher v. Loquasto, 255 Pa.

I do not advance the proposition that a Rule 37 sanction may never be employed to facilitate discovery of facts bearing upon the exercise of personal jurisdiction.

Super. 392, 389 A.2d 143 (1978) (possessing a license to practice medicine in Pennsylvania and maintaining a classified listing in a Pennsylvania telephone directory do not constitute continuous and substantial business activities); *Whalen v. Walt Disney World*, *supra* (purchase of $1,551,725 in merchandise from a company located in Pennsylvania, and purchase of liability insurance from a company incorporated in Pennsylvania do not meet continuous and substantial test); Garfield v. Homowack Lodge, Inc., 249 Pa. Super. 392, 378 A.2d 351 (1977) (weekly advertising in Philadelphia newspaper over five year period at cost of $2,000 per year, toll-free phone number to enable Philadelphia residents to make reservations at New York resort, and payment of 10% referral fee to Philadelphia travel agents constitute continuous and substantial business activity).

[3] *See* cases cited *supra* note 2. *Cf.* Bernardi Bros. v. Pride Mfg. Co., 427 F.2d 297 (3d Cir. 1970) (when claim unrelated to New Jersey, and defendant's sole contact with New Jersey was a nonexclusive agent residing in that forum, no basis for assertion of personal jurisdiction); DiCesare-Engler Productions, Inc. v. Mainman Ltd., 81 F.R.D. 703 (W.D. Pa. 1979) (rock star's occasional performances in Pennsylvania do not justify asserting personal jurisdiction over him in Pennsylvania when claim arose out of breach of contract to perform a concert in Ohio).

Nonetheless, the imposition of burdens of production in a distant place is one of the core elements of unfairness which the due process cases from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) through *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) address. It is small comfort to a defendant objecting to the imposition of that burden that it is being imposed only for the purpose of determining whether or not the court has authority to impose it. A proper accommodation between plaintiff's interest in a choice of a forum and defendants' due process protection against imposition of unfair burdens of production, it seems to me, requires that once a foreign defendant makes a *prima facie* showing both of absence of minimum contacts relating to the claim, and of absence of continuous and substantial forum presence, the plaintiff should have to do the initial traveling. *Cf. River Plate Corp. v. Forestal Land, Timber & Ry. Corp.*, 185 F.Supp. 832 (S.D.N.Y. 1960) (court's power to order compliance with discovery requests when it is unclear that the court has jurisdictional power over the defendant must be carefully circumscribed). Thus I would hold that the trial court abused its discretion in imposing the sanction of finding the jurisdictional facts against the defendant, at least until the court first ordered inspection of the relevant documents by the plaintiff at defendants' home base.

Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3856 (May 19, 1981), may possibly be read as prohibiting use of a Rule 37 sanction until such time as the plaintiff has fully met its burden of establishing personal jurisdiction. Were it so intended, I would not follow it that far. Defendant's refusal to permit inspection of documents at its home base at plaintiff's expense initially might support the imposition of the sanction imposed in this case. Such a refusal would effectively preclude the plaintiff from meeting its burden of establishing the jurisdictional facts. *Cf. Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10

(4th Cir. 1971) (dictum).[4] But it seems to me that an accommodation between the defendant's due process interests and the plaintiff's choice of a forum requires a more flexible interpretation of Rule 37 than the majority announces.[5] That is particularly the case when, as here, the record discloses no basis for the exercise of specific jurisdiction based on purposeful Pennsylvania contacts with the transaction sued on, and the attempted discovery is aimed at establishing a general corporate presence in that state. The far reaching inquiry into the establishment of general jurisdiction could impose costs and burdens far in excess of whatever premiums defendants derived from their prior forum activities. The record in this case establishes that many thousands of files would have to be examined to satisfy the plaintiff's inquiries. The burden of such an examination should have been placed initially on the plaintiff before sanctions were considered.[6] I would hold, therefore, that the trial court abused its discretion in imposing the Rule 37 sanction of finding the jurisdictional facts against those defendants left in the case. On the record, aside from the Rule 37 order, defendants maintain insufficient Pennsylvania connections to sustain either specific or general jurisdiction over them. I would reverse with a direction to grant their motion to dismiss.

---

[4] Even this basis for assertion of personal jurisdiction via discovery sanction is problematic, however. In effect, the district court would by relying on Rule 37 to *create* personal jurisdiction. This use of Rule 37 may well be inconsistent with Rule 82, which provides that the Federal Rules of Civil Procedure "shall not be construed to extend . . . the jurisdiction of the United States district courts. . .". Exercise of personal jurisdiction pursuant to a state long-arm statute involves both a fairness and a power analysis. *See, e.g., World Wide Volkswagen, supra*. It may not be unfair to subject the excess insurers to suit in Pennsylvania. They have certainly had notice and an opportunity to be heard. Fairness, however, is not all. The district court must also have some power over these defendants. On the facts available to the district court, it lacked that power. It is questionable whether a district court may concoct adjudicatory authority by virtue of defendant's flaunting the court's apparent lack of power. However frustrating defendant's recalcitrance, it does not imply, any more than does these defendants' partial compliance, that defendant in fact has maintained forum affiliations sufficient to justify assertion of either specific or general jurisdiction.

[5] The majority's reliance on English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), *cert. denied*, 444 U.S. 823 (1979), is misplaced. Although the Eighth Circuit affirmed the district court's assertion of personal jurisdiction as a Rule 37 sanction, the appellate court also observed that the nonresident corporation maintained sufficient forum affiliation to justify assertion of jurisdiction in any event. 590 F.2d at 728 n.6. Moreover, defendant's conduct in that case involved refusal adequately to answer, at its home base, written interrogatories. There was no burden of production at a distant place.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[6] Although defendants initially indicated they would comply with the district court's order to inspect and produce their documents in Pittsburgh, and subsequently and belatedly complied only partially, the district court entered the sanction to penalize not defendants' delay, but their insufficient compliance.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

vs.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., MERCANTILE & GENERAL REINSURANCE CO., LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO., LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. & L'UNION ATLANTIQUE S.A. D'ASSURANCES BRUSSELS, all being corporations

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 75-1567)

Present: SEITZ, *Chief Judge* and ALDISERT and GIBBONS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on April 21, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed August 5, 1980, be, and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court. Costs taxed against appellee.

ATTEST:
SALLY MRVOS
Clerk

June 10, 1981

Joint Appendix

3 -

No. 81-440

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX
VOLUME III

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, PA 15230
412-288-3144

Counsel of record
for Cross-petitioners

CLOYD R. MELLOTT
Eckert, Seamans, Cherin
& Mellott
42nd Floor
600 Grant Street
Pittsburgh, PA 15219
412-566-6000

Counsel of record
for Cross-respondent

PETITION FOR CERTIORARI FILED
SEPTEMBER 1, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

HERRICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15223

APPENDIX
TABLE OF CONTENTS
VOLUME III

Page

1. Exhibit 1 to complaint (=Pl.Ex.6)
   INA Policy 395a

2. Exhibit 2 to complaint
   Bland Welch cover note 423a

3. Exhibit B to affidavit of Witney
   CBG check to Marsh & McLennan 426a

4. Exhibit A to second affidavit of Bruckmann
   CBG Letter To Beadling, Marsh & McLennan 427a

5. Exhibit A to third affidavit of Bruckmann
   Location of Defendants' files 428a

6. Form Letter to brokers; Samples of responses and policies produced 430a

7. Exhibit A to motion for order due to failure to make discovery
   Form Letter to brokers (=6, first letter) .. 430a

Exhibits offered at preliminary injunction hearing

8. Pl.Ex. 1c
   Statement of claim in English suit 477a

9. Pl. Ex. 3
   Eagle Star schedule T 485a

10. Pl. Ex. 4
    Hanover schedule Ts 485a

11. Pl. Ex. 5
    Hershey's third affidavit (describing item 6) 487a

Page

Exhibits offered at permanent injunction hearing

Pl. Ex. 6 (=ITEM 1)
INA policy 395a

12. Pl. Ex. 7
Extract from Hardy Ivamy 497a

13. Pl. Ex. 8
Affidavit of Doty re depositions taken 502a

14. Pl. Ex. 9
Companies combined policy and Lloyd's policy 511a

15. Deft. Ex. C.
Countries of incorporation of defendants . 527a

16. Deft. Ex. 1 (=JG1)
Placing slip 529a

17. Deft. Ex. JG2
Acceptance stamps on deft. ex. 1 (JG1) ... 531a

18. Deft. Ex. JG2A
Typewritten List of JG2 acceptances 532a

19. Deft. Ex. F1
Offer of proof of British Reserve 533a

20. Deft. Ex. F2
Offer of proof of Continental 549a

21. Deft. Ex. F3
Offer of proof of Trident 552a

EXHIBIT 1 TO COMPLAINT
(PLAINTIFF'S EXHIBIT 6)

INSURANCE COMPANY OF NORTH AMERICA,
PHILADELPHIA, PENNSYLVANIA

STANDARD FIRE INSURANCE POLICY New York

Named COMPAGNIE DES BAUXITE DE GUINEA
(CBG) AND

Insured OFFICE D'AMENAGEMENT DE LA REGION
DE BOKE SFB 71HF 1195

(OFAB) CANAC CONSULTANTS LIMITED
Mailing c/o Marsh & McLennan, Inc.
Address One Oliver Plaza, Pittsburgh, PA 15222

Year *Feb. 12, 1974* *June 1, 1974*

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

INSURANCE IS PROVIDED AGAINST ONLY THOSE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW AT A PREMIUM CHARGE AND AGAINST OTHER PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO.

Amount	*Rate*	*Prepaid Term Premium Due At Inception*	*Annual Payment*	*Perils*
$10,000,000	.2644 (on est. gross earnings (See Clause 13)	$31,622.00		ALL RISK
TOTAL ANNUAL	Total(s)	$31,622.00		

Payments for Policy Term

Item TNo.	*Amount Fire or Fire and Extended Coverage or Other Peril*	*Per Cost of Co-Insurance Applicable*	*Description and Location of Property Covered*
1.	$10,000,000	N/A	Bauxite Mine, Sangasedi; shipment of raw ore to Kamsar; Bauxite preparation and ship loading facility, Kamsar Republic of Guinea.

Subject to Form No(s). See attached forms; End. #1 attached hereto.

Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to:

Insert name(s) of Mortgagor(s) and Mailing Address(es)

Agency at Philadelphia, PA
Countersignature Date Philip L. Richey Agent
Assistant Vice President

February 12, 1974
EAS:vl 4/1/74

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO AND OF the premium above specified, this Company, for the term of years specified above from inception date shown above At Noon (Standard Time) to expiration date shown above At Noon (Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure the insured named above and legal representatives, to the extent of the actual cash value of the property at the time of loss but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES

ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

Concealment, Fraud

This entire policy shall be void, if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and Excepted Property

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils Not Included

This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring:

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensues, and in that event for loss by fire only.

Other Perils or Subjects

Any other peril to be insured against or subject to insurance to be covered in this policy shall be by endorsement in writing thereon or added hereto.

Added Provisions

The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver Provisions

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of Policy

This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee Interests and Obligations

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the

Insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro Rata Liability

This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements In Case Loss Occurs

The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed and within sixty days after the loss, unless such time is extended in writing by this Company, the Insured shall render to this Company a proof of loss, signed and sworn to by the Insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the Insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The Insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal

In case the Insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the Insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraiser shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appariser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's Options

It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment

There can be no abandonment to this Company of any property.

When Less Payable

The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the Insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation

This Company may require from the insured an assignment of all rights of recovery against any party for loss to the extent that payment therefor is made by this Company.

IN WITNESS WHEREOF, the INSURANCE COMPANY OF NORTH AMERICA has caused this policy to be signed by its President and Secretary-Treasurer at Philadelphia, Pennsylvania, and countersigned on the declarations page by a duly authorized representative of the Company.

GEOFFREY STENGEL, *Secretary*

CHARLES K. COX, *President*

BUSINESS INTERRUPTION FORM

1. *This policy insures against:* loss resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property, except finished stock, by the peril(s) insured against, during the term of this policy, on premises occupied by the Insured and situated as herein described.

2. This policy does not insure against:

   (a) Mechanical Breakdown, unless other accident covered hereunder ensues, and then this policy shall cover the ensuing loss only;

(b) Theft, conversion or infidelity by any employee of the Insured. Actual physical damage to the Insured's property as a result of a willful act of malicious intent shall be deemed not to be an act of infidelity;

(c) Inherent vice, latent defect, wear and tear, gradual deterioration, delay, loss of market;

(d) Insurrection, rebellion, revolution, civil wars, usurp of power, or action taken by government authority in hindering, combatting, or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transporation or trade;

(e) Hostile or warlike action in time of peace or war, including action in hindering, combatting, or defending against an actual impending or expected attack;

  (i) By any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval or air forces, or

  (ii) By military, naval or air forces, or

  (iii) By an agent or any such government power, authority or forces;

(f) Any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(g) Loss by nuclear reaction or nuclear radiation, or radioactive contamination -all whether controlled or uncontrolled, and whether such loss be direct or indirect, approximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the perils insured against in this policy;

(h) Increase of loss resulting from:

   (i) Enforcement of any local or state ordinance or law regulating the construction, repair or demolition of buildings or structures; or

   (ii) Interference at the described premises, by strikers or other persons, with rebuilding, repairing or replacing the property or with the resumption or continuation of business; or

   (iii) The suspension, lapse or cancellation of any lease, license, contract or order unless such suspension, lapse or cancellation results directly from the interruption of business, and then this company shall be liable for only such loss as affects the Insured's earnings during, and limited to, the period of indemnity covered under this policy;

Nor shall this company be liable for any other consequential or remote loss.

[The next paragraph is marked void]

When this form is attached to a policy covering the perils of windstorm and hail, this company shall not be liable for any business interruption loss resulting from damage to or destruction of metal smokestacks by windstorm or hail, unless otherwise provided for by endorsement hereon and premium paid therefor.

(i) Any loss resulting from any electrical injury or disturbance to electrical appliances, devices, fixtures or wiring caused by electrical currents artificially generated unless fire ensues and, if fire does ensue, this company shall be liable only for its proportion of loss caused by such ensuing fire.

3. In the event of such damage or destruction this Company shall be liable for the ACTUAL LOSS SUSTAINED by the Insured resulting directly from such interruption of business, but not exceeding the reduction in Gross Earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this policy. Due consideration shall be given to the continuation of normal charges and expenses, including payroll expense, to the extent necessary to resume operations of the Insured with the same quality of service which existed immediately preceding the loss.

4. RESUMPTION OF OPERATIONS: It is a condition of this insurance that if the Insured could reduce the loss resulting from the interruption of business,

   (a) by complete or partial resumption of operation of the property herein described, whether damaged or not, or

   (b) by making use of other property at the location(s) described herein or elsewhere, or

   (c) by making use of stock (raw, in process or finished) at the location(s) described herein or elsewhere, such reduction shall be taken into account in arriving at the amount of loss hereunder.

5. EXPENSES RELATED TO REDUCING LOSS: This policy also covers such expenses as are necessarily incurred for the purpose of reducing loss under this policy (except expense incurred to extinguish a fire) and such expenses, in excess of normal, as would necessarily be incurred in replacing any finished stock used by the Insured to reduce loss under this policy, but in no event shall the aggregate of such expenses exceed the amount by which the loss otherwise payable under this policy is thereby reduced.

6. GROSS EARNINGS: For the purposes of this insurance "Gross Earnings" are defined as the sum of:

   (a) Total net sales value of production,

   (b) Total net sales of merchandise, and

   (c) Other earnings derived from operations of the business, less the cost of:

      (1) Raw Stock from which such production is derived,

      (2) Supplies consisting of materials consumed directly in the conversion of such raw stock into finished stock or in supplying the service(s) sold by the Insured,

      (3) Merchandise sold, including packaging materials therefor, and

      (4) Service(s) purchased from outsiders (not employees of the Insured) for resale which do not continue under contract.

No other costs shall be deducted in determining Gross Earnings.

In determining Gross Earnings due consideration shall be given to the experience of the business before the date of damage or destruction and the probable experience thereafter had no loss occurred.

7. FINISHED STOCK: This Company shall not be liable for any loss resulting from damage to or destruction of finished stock nor for the time required to reproduce said finished stock.

8. INTERRUPTION BY CIVIL AUTHORITY: This policy is extended to include the actual loss sustained by the Insured, resulting directly from an interruption of business as covered hereunder, during the length of time, not exceeding 2 consecutive weeks, when, as a direct result of damage to or destruction of property adjacent to the premises herein described by the peril(s) insured against, access to such described premises is specifically prohibited by order of civil authority.

9. LIMITATION—MEDIA FOR ELECTRONIC DATA PROCESSING: With respect to loss resulting from damage to or destruction of media for, or programming records pertaining to, electronic data processing or electronically controlled equipment, including data thereon, by the peril(s) insured against, the length of time for which this Company shall be liable hereunder shall not exceed

   (a) 30 consecutive calendar days; or

   (b) the length of time that would be required to rebuild, repair or replace such other property herein described as has been damaged or destroyed;

   whichever is the greater length of time.

10. DEFINITIONS: The following terms wherever used in this policy shall mean:
    (a) "Raw Stock": material in the state in which the Insured receives it for conversion by the Insured into finished stock.
    (b) "Stock in Process": raw stock which has undergone any aging, seasoning, mechanical or other process of manufacture at the location(s) herein described but which has not become finished stock.
    (c) "Finished Stock": stock manufactured by the Insured which in the ordinary course of the Insured's business is ready for packing, shipment or sale.
    (d) "Merchandise": goods kept for sale by the Insured which are not the product of manufacturing operations conducted by the Insured.
    (e) "Normal": the condition that would have existed had no loss occurred.

11. LOSS CLAUSE: Any loss hereunder shall not reduce the amount of this policy.

12. REQUIREMENTS IN CASE LOSS OCCURS: The Insured shall give immediate written notice to this company of any business interruption loss and protect the property from further damage that might result in extension of the period of interruption; and within 60 days following the date of damage to or destruction of the real or personal property described, unless such time is extended in writing by this company, the Insured shall render to this company a proof of loss, signed and sworn to by the Insured, stating the knowledge and belief of the Insured as to the following:

(a) The time and origin of the property damage or destruction causing the interruption of business,

(b) The interest of the Insured and of all others in the business,

(c) All other contracts of insurance, whether valid or not, covering in any manner the loss insured against by this policy,

(d) Any chanqes in the title, nature, location, encumbrance or possession of said business since the issuing of this policy, and

(e) By whom and for what purpose any building herein described and the several parts thereof were occupied at the time of damage or destruction,

and shall furnish a copy of all the descriptions and schedules in all policies, and the actual amount of business interruption value and loss claimed, accompanied by detailed exhibits of all values, costs and estimates upon which such amounts are based.

The Insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

13. PREMIUM CLAUSE: The annual deposit premium shown in the Declarations is based upon an estimated Gross Earnings of $40,000,000. The Insured

shall submit to this company in writing within 90 days after the expiration of each 12 month period a statement of actual Gross Earnings—as defined in this policy—for such period. The company then shall calculate the actual earned premium and a.) charge the Insured for any additional premium due or b.) refund to the Insured any return premium, subject to any minimum premium imposed.

The deposit premium for the following 12 month period will be equal to the actual earned premium for the preceding 12 months.

14. CANCELLATION: Notwithstanding anything to the contrary stated in the printed conditions, this policy may be cancelled by either party giving written notice stating when, not less than ninety (90) days thereafter, such cancellation shall be effective. The mailing of notice to the last known address of either party shall be sufficient proof of notice and the effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Insured or by the company shall be equivalent to mailing.

If the Insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any refund or premium due to the Insured.

Named Insured_______________

Policy No. 71HF 1195

Policy Period________

Effective Date of Endorsement________

Issued by ___________, (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the preparation of the policy.

[The first paragraph is marked void]

It is further understood and agreed that no coverage is provided for testing and trials of machinery and/or plant of any type.

ENDORSEMENT #1

PHILIP L RICHEY
Authorized Agent

Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DEGUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 2/12/74-6/1/74

Effective Date of Endorsement February 12, 1974

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the preparation of the policy.

In consideration of the premium charged, it is agreed that this policy shall not apply to any property (or part thereof) described in the Declarations until:

a.) the property is taken over, taken into use or a Certificate of Acceptance has been issued, whichever first occurs;

b.) cover under the Builder's Risk Policy No. 7007 has ceased.

EAS:vl
4/11/74

REVISED ENDORSEMENT #1

Philip L Richey
Authorized Agent

Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DEGUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 2/12/74-6/1/74

Effective Date of Endorsement February 12, 1974

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the preparation of the policy.

In consideration of the premium charged, it is agreed that the following is deleted from paragraph 2.(h.) of this policy:

> When this form is attached to a policy covering the perils of windstorm and hail, this company shall not be liable for any business interruption loss resulting from damage to or destruction of metal smokestacks by windstorm or hail, unless otherwise provided for by endorsement hereon and premium paid therefore.

EAS:vl
4/11/74

ENDORSEMENT #2

PHILIP L RICHEY
Authorized Agent

Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DE GUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 2/12/74-6/1/74

Effective Date of Endorsement February 12, 1974

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the proportion of the policy.

WAITING PERIOD

The liability of the company, as respects each interruption of business, whether in whole or in part, under this policy shall not attach until the period of interruption exceeds:

a.) 7 consecutive work days, if caused by peril(s) insured against except collision by ships with the shiploading facility;

b.) 28 consecutive work days, if caused by collision of ships with the shiploading facility;

and then the Company shall be liable only for the continuing period of interruption in excess of the number of work days shown in a.) or b.), whichever applies.

EAS:vl3
4/11/74

ENDORSEMENT #3

PHILIP L RICHEY
Authorized Agent

Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DE GUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 2/12/74-6/1/74

Effective Date of Endorsement February 12, 1974

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the preparation of the policy.

In consideration of the premium charged, it is agreed that Revised Endorsement #1, is deleted, and the following is substituted in lieu thereof:

This Policy shall not apply to any property (or part thereof) described in the Declarations until the attachment of coverage provided under Paragraph 6, Maintenance Period of the Schedule of Builders Risk Policy No. 7007.

EAS:vl
5/17/74 ENDORSEMENT #4

PHILIP L RICHEY
Authorized Agent

Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DE GUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 2/12/74 to 6/1/74

Effective Date of Endorsement February 12, 1974

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the preparation of the policy.

BUSINESS INTERRUPTION

It is hereby agreed, and understood the loss, if any, shall be adjusted with COMPAGNIE DES BAUXITES DE GUINEA (CBG), and payable as directed by it. The receipt of the payees so designated shall constitute a release in full of all liability with respect to such loss.

EAS:vl
6/17/74 ENDORSEMENT #5

....
Authorized Agent

Assistant Vice President

INSURANCE COMPANY OF NORTH AMERICA
INTERNATIONAL DEPARTMENT

Revised

FIRE	
ALLIED PERILS	
MARINE INLAND	$105,760.00 Deposit
WORKMEN'S COMPENSATION	
BODILY INJURY (AUTO)	
PROPERTY DAMAGE (AUTO)	
MEDICAL PAYMENTS	
COMPREHENSIVE	
COLLISION	
BODILY INJURY (GL)	
PROPERTY DAMAGE (GL)	
BURGLARY	
TOTAL PREMIUM	$105,760.00 Deposit
ENDORSEMENT NUMBER	6
POLICY NUMBER	71HF 1195
CLASS OF BUSINESS	Inland Marine
AMOUNT OF INSURANCE OR LIMITS OF LIABILITY	$10,000,000.00

IN CONSIDERATION OF THE RENEWAL PREMIUM ABOVE STATED. THIS POLICY ISSUED TO COMPAGNIE DES BAUXITE DE GUINEA (CBG) ET AL WHOSE ADDRESS IS C/O Marsh & McLennan, Inc. One Oliver Plaza, Pittsburgh, Pa. 15222 IS RENEWED FOR THE TERM OF One Year FROM June 1, 1974 TO June 1, 1975 SUBJECT TO THE TERMS AND CONDITIONS THEREOF EXCEPT AS FOLLOWS:

NOT VALID UNLESS COUNTERSIGNED BY A DULY AUTHORIZED AGENT.

GEOFFREY STENGEL, *Secretary*	FRANK L. RASS, *President*

COUNTERSIGNED AT Philadelphia, Penna. THIS 1st DAY OF June 19 74

EAS:vl
7/17/74

PHILIP L. RICHEY, Agent
Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DE GUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 6/1/74-6/1/75

Effective Date of Endorsement June 1, 1974

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the preparation of the policy.

It is agreed that the minumum earned premium for the term June 1, 1974 to June 1, 1975 is $100,000.

It is further agreed that the twelve month premium adjustment is waived until June 1, 1975, and it will be made for the period February 12, 1974 to June 1, 1975.

EAS:vl
7/19/74 Revised ENDORSEMENT #7

PHILIP L. RICHEY
Authorized Agent

Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DE GUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 6/1/74-6/1/75

Effective Date of Endorsement November 25, 1974

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed when this endorsement is issued subsequent to the preparation of the policy.

In consideration of an additional premium of $11,454.00, it is hereby understood and agreed that the policy is amended as follows:

1- Rate increase from .2644% to .32%

2- Waiting period increased from 7 days to 14 days under Paragraph A) Endorsement #3.

FS:nc
12/3/74 ENDORSEMENT #8

PHILIP L. RICHEY
Authorized Agent
Assistant Vice President

Named Insured COMPAGNIE DES BAUXITES DE GUINEA (CBG) ET AL

Policy No. 71HF 1195

Policy Period 6/1/74-6/1/75

Effective Date of Endorsement June 1, 1975

Issued by I.N.A. (Name of Insurance Company)

The above is required to be completed only when this endorsement is issued subsequent to the preparation of the policy.

In accordance with Clause 13 and Endorsement 7, the earned premium is calculated as follows:

Estimated Gross Earnings:	$40,000,000.00
Actual Gross Earnings:	43,070,409.00
Difference:	3,070,409.00
Rate for 6/1/74-11/25/74 period:	.2644%
Pro Rata Factor-6/1/74-11/25/74:	.485
Rate for 11/25/74-6/1/74 period:	.32%
Pro Rata Factor-11/25/74-6/1/75:	.515
Additional Premium Due	$8,997.00

No adjustment is made for the 2/12/74-6/1/74 period.

VMT:vl
8/13/75 ENDORSEMENT #9

PHILIP L. RICHEY
Authorized Agent

Assistant Vice President

EXHIBIT 2 TO COMPLAINT

BLAND, WELCH & CO. LTD.
Incorporating Alert Maclean & Co.
Founded 1830 International Telex:
Telephone London 333991
INSURANCE BROKERS & UNDERWRITING AGENTS
01-623 3454 London 333992
Registered Office:
01-433 3481 London 333993
(Private Branch Exchanges) SACKVILLE HOUSE,
——— Cables:
143/9 FENCHURCH STREET
Telegrams: MacLloyds London—EC3
LONDON, EC3M BN
MacLloyds Fen London
and at Lloyd's
Registered in England No. 43952s

Marsh & McLennan Inc. Our Reference: 4093011
PITTSBURGH

COVER NOTE

This Insurance effected with Companies as more fully set out herein is for 100% of the following Insurance:-

TYPE:	ALL RISKS PHYSICAL LOSS OR DAMAGE.
FORM:	Wording as underlying as far as possible, to be agreed by Underwriters.

ASSURED:	COMPAGNIE des BAUXITES DE GUINEA (C.B.G.) &/or OFFICE d' AMENAGEMENT de la REGION DE BOKE (O.F.A.B.).
PERIOD:	Continuous at 12th February 1974 subject three months notice of cancellation received prior anniversary (12th February).
INTEREST:	BUSINESS INTERRUPTION (6 Months Period of Indemnity).
SUM INSURED:	U.S.$.10,000,000 each and every loss, Excess of U.S.$.10,000,000 each and every loss.
SITUATION:	Guinea.
PREMIUM:	0.80% on Annual Profits.

Information given to Underwriters:

Annual Profit estimated U.S.$.40,000,000. Primary policy contains deductible 7 days and 28 working days applicable to wharf area as more fully described in policy.

EFFECTED WITH: As attached.

For and on behalf of
BLAND, WELCH & CO. LTD.

Exhibit "2"

Director.
LONDON: 10th April 1974
BLAND WELCH (INTERNATIONAL) LTD.

EFFECTED WITH:—

The Insurance Corporation of Ireland Ltd.	47.9616%
Mercantile & General Reinsurance Co. Ltd.	7.9936%
Eagle Star Insurance Co. Ltd.	4.7962%
Hanover Insurance Company.	4.7962%
Continental Assurance Company of London Ltd.	3.1974%
The Century Insurance Co. Ltd.	3.9968%
Yuval, the Insurance Company of Israel Ltd.	3.9968%
Home Insurance Co. Ltd.	3.1974%
Slater, Walker Insurance Co. Ltd.	2.3981%
Yasuda Fire & Marine Insurance Co (UK) Ltd.	1.5987%
Nichido Fire & Marine Insurance Co. Ltd.	.3997%
Turegum Insurance Company.	.9992%
Excess Insurance Co. Ltd.	1.5987%
Sahar Insurance Co. Ltd.	1.1990%
Trident Insurance Co. Ltd.	.7994%
Vesta (UK) Ltd.	.1998%
Chiyoda Fire & Marine Insurance Co.Ltd.Tokyo.	.1999%
Stronghold Insurance Co. Ltd.	.7994%
British Reserve Insurance Co. Ltd.	.7994%
English & American Insurance Co. Ltd.	.4796%
Consolidated European Reinsurance Co. Ltd. .5995%	
L'Union Atlantique S.A. d'Assurances, Brussels	7.9936%
	100.0000%

EXHIBIT B TO AFFIDAVIT OF WILLIAM B. WITNEY

COMPAGNIE DES BAUXITES DE GUINEE
900 Two Allegheny Center
Pittsburgh, Pa. 15212

Check Date	Check No.
7-3-74	16601

Pay to the
Order of

	Dollars	Cents
Marsh & McLennan One Oliver Plaza, Suite 3450 Pittsburgh, Pennsylvania 15222	$216,921	00

PAY Exactly 216,921 and 00 Cts

David K. Waer
Authorized Signature

24 Fifth Avenue Office
PITTSBURGH NATIONAL BANK
Pittsburgh, Pennsylvania

EXHIBIT A TO SECOND AFFIDAVIT OF MARK A. BRUCKMANN

COMPAGNIE DES BAUXITES DE GUINEE
900 Two Allegheny Center
Pittsburgh, Pa. 15212 U.S.A.

Telephone (412) 553-4800
Cable: HALCOMIN
Telex: 81-2465

13 June 1975

Mr. M. C. Beadling, Vice President
Marsh & McLennan Incorporated
One Oliver Plaza, Suite 3450
Pittsburgh, Pennsylvania 15222

RE: Damage to Concrete Structure—PAN FEEDERS

Dear Mr. Beadling:

This will confirm my telephone conversation with you this date in which I indicated that Mr. Pappas has again reviewed the facts and figures surrounding the above and has decided that a claim under the business interruption policy for loss resulting from damage to the crusher feeder installation should be formally filed and we suggest you notify INA that the back-up information for a multi-million dollar claim is being prepared.

Very truly yours,

David K. Waer

DKW:sr

cc: H. C. Pappas
J. W. Lampert

EXHIBIT A TO THIRD AFFIDAVIT OF MARK H. BRUCKMANN

Defendants	*Number of Files Available for Inspection in Order to Determine if the Source of Business Was From Pennsylvania*	*Where are Documents Located*
Consolidated European	25,000 since 1972	37 Lime Street London, England
Continental Assurance	30,000-40,000 since 1973	125 Fenchurch Street London, England
British Reserve	20,000 since 1976	London, England
Trident		Gloucester, England
Vesta	Together approximately 40,000 since 1971	Gloucester, England
Chiyoda		Gloucester, England
Slater, Walker	25,000 since 1971	Fountain House & Shepherds Bush London, England
English & American	150,000 since 1971	Fountain House & 60 Fenchurch Street & Vincular House London, England

Defendants	*Number of Files Available for Inspection in Order to Determine if the Source of Business Was From Pennsylvania*	*Where are Documents Located*
Excess Ins. Company	3,000,000-4,000,000 since 1971	London & Worthing England
Nichoda	28,000 since 1971	4 Fenchurch Street London, England
Yasuda	56,000 since 1971	4 Fenchurch Street London, England
Sahar	35,000 since 1971	Tel Aviv, Israel
Ins. Corp. of Ireland	60,000 since 1976	37 Lime Street London, England
Stronghold	30,000 since 1971	40 Lime Street London, England
L'Union Atlantique	unknown	7 Rue Belliard Brussels, Belgium

The exhibit contains two additional columns, in which the answers for each of the defendants are the same:

Method of Recordkeeping	*Would defendant make these documents available for inspection?*
Geographic location of risk	Yes

FORM LETTER TO BROKERS (EXHIBIT A TO PLAINTIFF'S MOTION FOR ORDER ONE TO FAILURE TO MAKE DISCOVERY)

INSURANCE
CORPORATION
37 39 Lime Street, London, EC3M75A
J GRACE London Manager

Telephone 01-626-9901 2 3 4
This matter is being dealt with by

J. GRACE

who will answer any queries

Your reference
in reply please quote JG/BW 8th January 1979
our reference

BUSINESS EMANATING FROM U.S.A.

On the advice of our American attorneys in connection with certain proceedings in Pennsylvania it is necessary for us to respond within 60 days from the 21st December 1978 to a ruling of the Pennsylvania Court that we produce copies of all policies:—

A. for insureds in Pennsylvania, or

B. for risks located in Pennsylvania, or

C. which were issued through brokers located in Pennsylvania

for the period from the 1st January 1972 through July 27th 1978.

If we do not use our best efforts to comply with this order we face being penalised by the Pennsylvania Court and it is therefore necessary to ask for your assistance in providing copies of all policies placed with us falling within the above categories in respect of Pennsylvania business.

It is right that we should tell you that the consequence of not complying with the learned judges' ruling could, in the long term, prejudice our ability to underwrite business involving a potential exposure in the State of Pennsylvania.

Yours faithfully,

JOHN GRACE
Fire Manager

RESPONSES FROM BROKERS

BOWRING

C. T. Bowring & Co.
(Insurance) Ltd.

The Bowring Building
PO Box 145
Tower Place
London EC3P 3BE

American NonMarine
Division

Telephone: 01-283 3100
Telegrams: Bowinsur
London EC3
Telex: 888321

J.Grace
Fire Manager
Insurance Corporation of Ireland Limited
37/39 Lime Street
London EC3M 7EA

16th January, 1979

Our Ref: RFC/DB

Dear Sir,

BUSINESS EMANATING FROM U.S.A.

Thank you for your letter of 4th January, 1979, but we regret that it is absolutely impossible for us to establish from our records the number of risks on which you participate under categories A, B, and C listed in your letter. I am sure you realise that we have many thousands of Policies on risks throughout the U.S.A., both direct and reinsurance, and it would literally take months to obtain the information you require.

We are sorry that we are unable to assist you.

Yours faithfully,

R. F. COPLESTON
Assistant Director

Brentnall Beard Ltd.

Incorporating Brentnall Beard International Ltd
Lloyd's Brokers
A member of the British Insurance Brokers' Association
Ibex House 42/46 Minories London EC3N HX
Telephone 01-480 5688 Telex 883794 Cables Be be eye
London EC3

Our Ref: JFAK/PW 30th January, 1979

The Insurance Corporation of Ireland Limited.,
37/39 Lime Street,
London,
EC3M 7EA.

Dear Sirs,

BUSINESS EMANATING FROM U.S.A.

We would refer you to your request for copies of all policies emanating from brokers, insureds and risks located in the State of Pennsylvania.

In this regard, we cannot recall any particular insurance that we have placed with your Company, which is situated or relative to the above State.

We would make it clear, however, that we are unable to furnish you with a definite statement to the effect that no Pennsylvania business was ever written by your Company through our office, as this would involve an enormous time consuming and inconvenience excerise of tracing every insurance file recorded if at all possible during the period in question.

We regret that we are unable to assist you further in this respect.

Yours Faithfully,
Brentnall Beard International Limited
J. F. A. KENSIT

BAIN DAWES
AEB/gmk

Mr. John Grace,
Fire Manager,
Insurance Corporation,
37/39 Lime Street,

London EC3M 7EA.

BAIN DAWES LIMITED
International Insurance Broker
NORTH AMERICAN DIVISION
Bain Dawes House
15 Minories London EC3N INJ
and at Lloyd's
Telephone 01-481 3232
Telex 8813411
Cables: Baindawes London Telex

15th January 1979.

Dear John,

RE: BUSINESS EMANATING FROM U.S.A.

With reference to your letter dated 4th January 1979, under the heading "Business Emanating from U.S.A." we have made an initial study within Bain Dawes Limited to establish exactly what would be entailed in extracting the information required under your headings A. B. and C.

As you are well aware we operate very much within Bain Dawes Limited under separate Divisions i.e. Marine, Non-Marine, and Aviation, with each Division operating independantly relative to day to day processing of individual accounts. We do not have any system where we could immediately breakdown our Port-Folio into the categories of business that you require. The only possibility of our being in a position to provide this information would be an extremely lengthy manual process which would necessitate a review of each placement from each of the above mentioned Divisions during the period 1st January 1972 to 27th July 1978.

I would imagine that this exercise would take many weeks of at least one persons time from each of the previous mentioned Divisions and as I am sure you are aware we would then be in a position of having to provide individual copy policies for all those items which fell into the categories requested.

Incidentally the accuracy of any such exercise could in no way be guaranteed insofar as items A. & B. in your letter could well be missed in our researches on many programmes we have, where there are State wide subsidiaries or locations.

John, even with our best will I would ask you to reconsider the request contained in your letter as the task to produce these items will be monumental and I feel sure would in no way be totally satisfactory or complete. I will await your further advices.

Yours sincerely,

ALAN E. BRIGGS
Managing Director

WILLIS, FABER & DUMAS LTD.
Insurance Brokers and Underwriters
Telephone: Ipswich (0473) 217911
Extn. 3495 Suffolk
Telex: 882141

Friars Street
Ipswich, IPI ITA

16th January, 1979

INSURANCE CORPORATION OF IRELAND LTD.,
37/39 Lime Street
London, EC3M 7EA

Your Reference: JG/BW

FOR THE ATTENTION OF
J. GRACE

Our Reference U/JHB - 21

Dear Sirs,

PENNSYLVANIA BUSINESS EMANATING FROM U.S.A.

Thank you for your letter which we received recently regarding the above, but regret to advise you that we are unable to comply with your request to produce copies of policies in respect of Pennsylvania business.

Please be assured that this negative response is not reluctance to undertake the work involved, but the very practical consideration that it is impossible for us to trace with any degree of certainty the risk and/or Insured and/or Brokers in that territory.

We feel sure that you will understand that as Brokers we do not maintain "location cards" and the job of discovering which risks had a Pennsylvania content would, therefore, present us with an impossible task. We deeply regret having to be so "stone wall" but quite frankly we are unable to help.

Yours faithfully,
WILLIS, FABER &
DUMAS LTD.
J. H. BURTON
Manager—
International Division

C.E. HEATH & CO. (NORTH AMERICA) LIMITED
Lloyd's Insurance Brokers
Reg Office: Cuthbert Heath House, 151/154 Minories,
London EC3N 1NR
Telephone: 01-488 2488
Cables: Erycinus London
Telex: 8813001 (885243 885280 888088)
Reg. No. 1006219 England

15th January, 2979
Our Ref: S/AH/RPD

Mr. John Grace,
The Insurance Corporation of Ireland Ltd.,
37/39 Lime Street,
LONDON, EC3M 7EA.

Dear Mr. Grace,

RE: BUSINESS EMANATING FROM U.S.A.

With reference to your letter of 4th January, it would appear from our records that there is only one risk on which you participate which reached us via a Broker located in Pennsylvania, the details of this placement are shown on the attached.

The information requested in A and B of your letter presents us with an insurmountable task in that we do not have a method of pulling out files for Insureds in Pennsylvania or risks so located.

We regret our inability to fully comply with your request, however, we are sure that you will realise the practicalities of the situation.

Yours sincerley,

C.E. HEATH & CO. (NORTH
AMERICA) LIMITED
A. HYATT
Assistant Director

TYPE: EXCESS ALL RISKS INSURANCE

FORM: J(a) with L.P.O. 346 and 349 covering All Risks of Physical Loss or Damage [and/or] as underlying

ASSURED: *SIMKINS INDUSTRIES INC AND/ OR SIMKINS CORP.*

PERIOD: 12 months at 1st October 1976 [or date t.b.a. L/U] [(and/or pro rata to expiry of underlying)]

INTEREST: *Buildings, Contents and Use and Occupancy* as underlying

SUM INSURED: Policy to pay up to *$6,000,000 each and every loss*

EXCESS OF

$5,000,000 each and every loss

SITUATED: Various locations U.S.A.

CONDITIONS:

PREMIUM:

BROKERAGE: 20% plus tax as applicable

INFORMATION: *See data on file C.E. Heath & Co. Ltd.*
4 locations exposed
All Sprinklered
Top location New Haven, Conn.
Schedule as attached

Underwriters Agreement (N.A.A.) in sum insured up to written lines plus 10T t.b.a. L/U only.

Resignings t.b.i. by first three Underwriters only slips and premium adjustments t.b.i. (if required by L/U only.)

Subject otherwise to the terms of the C.C.A.A. 1960, Companies that authorisation forms in respect of this policy shall not.

SIMKINS INDUSTRIES INC. AND/OR SIMKINS CORP.

SCHEDULE OF LOCATIONS AND LIMITS

	Locations	*Limit*
1.	259 East Street, New Haven, Connecticut	$15,300,000
2.	Rohodes Lane & Orlando Avenue Lakeview, West Hempstead, L.I., New York	5,550,000
3.	Thistle Road & Patapsco River Ilchester, Maryland	7,700,000
4.	J & S Trucking Co. 1600 New Highway Farmingdale, L.I., New York	250,000
5.	2930 N.W. 39th Avenue A/K/As Simkins Road, N.W. 40th Avenues & 3939 N.W. 27th Street, Miami, Florida	6,850,000
6.	2824 No. Second Street, W. Cambria Street Philadelphia, Pennsylvania	4,550,000
7.	991-1029 River Street & Grand Avenue, Ridgefield, New Jersey	3,000,000
8.	Hackensack River, W. of River Road Bogota, New Jersey	2,050,000
9.	North Side Boston Road Branford, Connecticut	910,000
10.	Rte. 26 et K. Pt. 8.5 San Juan, Puerto Rico, Carolina, Sabana Abaja, Puerto Rico	1,150,000
11.	3021 S.W. First Terrace Ft. Lauderdale, Florida	490,000
		$47,800,000

Effective Inception:

Sum Insured amended to read as follows— Policy to pay up to $6,000,000 each & every loss Excess of $5,000,000 each and every loss.

NOTED & AGREED.

KININMONTH NORTH AMERICA LIMITED
3-4 Rangoon Street London EC3N 2AX
Telephone 01-481 8001 Cables Kininmonth London EC3
Telex 885586
INSURANCE BROKERS & CONSULTANTS

Mr. John Grace,
Fire Manager, Your reference
Insurance Corporation of Ireland Ltd. Our reference AMSD/SA
37/39 Lime Street Date 19th January, 1979
London EC3M 7EA

Dear Mr. Grace,

Business Emanating from U.S.A. (Pennsylvania)

Thank you for your letter of 4th January 1979 requesting copies of policies:—

A. For Insureds in Pennsylvania, or

B. For risks located in Pennsylvania, or

C. Which were issued through Brokers located in Pennsylvania.

for the period from 1st January 1972 through July 27th 1978.

We would be pleased to be able to comply with your requirements, however we regret that this task is totally impracticable in terms of staff, time and expense.

We hope that our refusal does not cause your offices too much difficulty.

Yours sincerely,
A.M.S. Davies
Director

MINET
Lloyd's & International
Insurance Brokers
J H Minet & Co Ltd
Registered England 513938

Insurance Corporation of Ireland Limited Registered Office

37/39 Lime Street,
London EC3M 7EA

Minet House 100 Leman Street
London El 8HG and at Lloyd's

For the attention of
J. Grace

Tel 01 481 0707
Accounts 01 550 6635
Telegraph Minsuret London EC3
Telex 8813901 JHMLDN G

Date 30th January 1979
Your Ref J. Grace
Our Ref PHH/OPM

Dear Sirs,

BUSINESS EMANATING FROM U.S.A.

Please refer to your letter of 4th January 1979.

Naturally we have been anxious to assist you and the court if this was at all possible but we regret that having given this matter a great deal of thought we can see no way of producing the information requested.

It is unfortunately not just a question of time but rather a practical impossibility to conform to the stated requirements.

Nonetheless we are sorry that we could not assist in this matter.

Yours faithfully,
P.H. HOLMES
Director
J.H. MINET & CO.LTD.,
North American Division.

Stewart Wrightson
(North America) Limited
International Insurance Brokers

1 Camomile Street
London EC3A 7HJ
Telephone 01-623 7511
Telex 8811181
Cables Lutidine London

Insurance Corporation of Ireland Limited,
37-39 Lime Street,
London, E.C.3

For the attention of the Fire Manager

Your ref	Our ref	Date
JG/BW	ARN/DEN	18th January, 1979

Dear Sirs,

BUSINESS EMANATING FROM USA

We thank you for your letter dated 4th January, 1979 but regret we are unable to furnish you with the information required in respect of Pennsylvania business. Unfortunately, we do not maintain our records in such a way that would enable this information to be accessed.

Yours faithfully,
A. R. NICHOLLS

GLANVILL ENTHOVEN
(Overseas) Limited

144 Leadenhall Street London EC3P 3BJ (Registered Office)
TELEPHONE D1-283 4622 TELEX 888097
TELEGRAMS AND CABLES
GLANTHOVER LONDON EC3

The Continental Assurance
Co of London Ltd
130 Fenchurch Street
LONDON EC3

For the attention of
Mr. C. J. Martin
Claims Superintendent

Our ref D H G/PMH
Ext no 343

Your ref

Date 1st February, 1979

Dear Sirs

Business Emanating from U.S.A.

We have now received a great number of letters from individual companies operating in the London market in respect of a ruling by a Pennsylvania Court requiring identification of Pennsylvanian risks.

We have carried out a preliminary analysis of this problem and regret to say that with the best will in the world, it is just not possible for us to secure the information that you require and certainly not within the time limit given. It is clear that the task that you have asked of us is an enormous one which would require us to divert a considerable labour force for a long period of time, at the end of which it would be questionable as to the final quality of the results.

We regret, therefore, that we are not in a position to answer the questions that you have posed to us.

Yours faithfully

GLANVILL ENTHOVEN
(OVERSEAS) LTD
D H G
Director

BLAND PAYNE LIMITED
Lloyd's Insurance Brokers
International Insurance Brokers
Registered Office Sackville House
143/152 Fenchurch Street
London EC3M 68N
telephone 01-623 8080
telex 888991 Blandp G
cables Blandpayne London Ec3

ADS/ns
26th January 1979
The Continental Assurance Company of
London Ltd
11 Penn Place
Rickmansworth
Herts
WD3 1RE

For the attention of C J Martin Esq

Dear Sirs

BUSINESS EMANATING FROM U.S.A.

Thank you for your letter dated 22nd January 1979, requesting information on risks underwritten by yourselves during the period 1st January 1972 to 27th July 1978, with regard to Pennsylvania. Whilst we would obviously like to do all we can to co-operate with you in this matter, we regret that our records do not enable us to extract this information in respect of The Continental Assurance Company of London Ltd underwritings, or for that matter, any other Insurance Company. We are sorry that we are unable to be more helpful, but trust you understand our position in this matter.

Yours faithfully
For and on behalf of
BLAND PAYNE LIMITED
A. D. SHERWOOD
Director
BLAND PAYNE (INTERNATIONAL) LTD

ALEXANDER HOWDEN
INSURANCE BROKERS LTD.
Registered Office
22 Billiter Street
C.N.A.R.E. London EC3M 25A
Insurance of Lloyd's Brokers
London Ltd., Your reference
Fountain House,
125-135 Fenchurch Street,
London EC3M 5DJ
Telephone 01-488 0808
Telegrams Howden-London EO
International Telex 882171
Our reference
RAP/EJP/2Fl

20th February 1979

Dear Sirs,

Business Emanating from U.S.A.

In reply to your letter concerning information required in connection with risks where either,

(1) Insureds are domiciled.

(2) Risks are located,

OR,

(3) Brokers are located, in Pennsylvania.

I am sorry to have to advise that our records for individual risks are such that we are unable to cater for the withdrawal of any of the above categorized information, therefore, I am afraid we are unable to assist in this situation.

Yours faithfully,
ALEXANDER HOWDEN
INSURANCE BROKERS
LIMITED
R. A. PLAMPTON
AMERICAN PRODUCTION DEPARTMENT

HARTLEY COOPER
& Co.Limited
Incorporated Insurance Brokers Authorised Brokers at Lloyds
85 Gracechurch Street
London EC3V OAJ

Telephone: 01 623 4333
Cable Address: Ernest London EC3
Telex No 8814586 Ernest G
INTERNATIONAL NON-MARINE DIVISION

2nd February, 1979

Managing Director,
Leslie & Godwin Agencies Ltd.,
Dunster House,
Mark Lane,
London
EC3P 3AD.

Dear Sirs,

BUSINESS EMANATING FROM USA (PENNSYLVANIA)

We refer to your letter dated 22nd January, 1979 in connection with the ruling of the Pennsylvania Court to produce copies of all policies

A. For Insureds in Pennsylvania, or

B. For risks located in Pennsylvania, or

C. Which were issued through brokers located in Pennsylvania

for the period from the 1st January, 1972 through July 27th, 1978.

Much as we would like to comply with your request we find it wholly impossible to do so for like most brokers we do not enter risks by state but by the name of the insured coupled with the fact that it is just not feasible to produce every policy with a Pennsylvanian content going back the last 6-1/2 years.

We regret having to answer your circular letter in this way but feel sure you will understand the reasons for doing so.

Yours faithfully,
for HARTLEY COOPER &
CO, LIMITED
R.A.W. WALKER,
Director

C.J. COLEMAN & COMPANY LTD.
LLOYD'S BROKERS

DIRECTORS
C.J. Coleman

G.M.S. Monkland

K.J. Whittingham
M.S. Wells

Portsoken House
155 Minories' London EC3N
1BT 01-480 6055
Cable Address Coinsure
London
Telex 88118

31st January, 1979.

B.A.M. Crowder Es.,
Assistant Director
Excess Insurance Group,
Excess House
13, Fenchurch Avenue
LONDON, EC3M 5BT.

Dear Sirs,

RE: BUSINESS EMANATING FROM U.S.A.

We have your recent letter requesting copies of all policies placed by us with you in respect of Pennsylvania business.

Whilst we would of course like to be co-operative, we feel that this is an unreasonable request to make of a firm of London Brokers, particularly in the time available.

We do not have the benefit of mechanised accounting or computerization and therefore any research of this nature would have to be undertaken in a very laborious manner by checking back through books of account, referring each entry to a placing file and then locating the appropriate underwriting slip or closing instruction to determine if Pennsylvania was involved in any way.

Even if we were able to get to that point we would have no way of producing a copy of a policy because once signed it is our practice to retain only the signing details and not copies of the full document. We could approach the American broker by whom we were given the business, but here again it is extremely doubtful if they retained copies of the original policy.

You will readily understand therefore that the time and the consequent cost of such an investigation is something which we are reluctant to absorb and to be honest we simply do not have the resources to be able to accomplish what you require.

A further complication would seem to be that the majority of business which you have written to us is as reinsurance of various American domestic companies where we have no knowledge of the location or the production sources of the original policies.

We regret our apparent inability to be of assistance but should you wish to discuss the matter further, please do not hesitate to telephone.

Yours faithfully

Director

BERISFORD MOCATTA & CO. LTD.
47 Mark Lane, London EC3R 7QH
Lloyd's Brokers
Telephone: 01-488 3211
Telex: 8814740
Cables: Berisfords

Your ref: BAMC/KML
Our ref: DAM/COL

Excess Insurance Group
13 Fenchurch Avenue
London
EC3M 5BT

For the attention of
Mr. B. A. M. Crowder
Assistant Director

2nd February, 1979

Dear Sirs,

BUSINESS EMANATING FROM U.S.A.

In answer to your enquiry dated 24th January, 1979, we would adivse that this office has placed no business emanating from the State of Pennsylvania with your Company.

Yours faithfully
D. A. MOCATTA
Director

Our Ref WFM
Your Ref
Messrs Mendes & Mount,
c/o Insurance Corp.
of Ireland Ltd.,
37/39 Lime Street,

LONDON,
EC3M 7EA

TRIDENT
GENERAL
Trident General Insurance
Company Limited

Trident House
Russell Street
Gloucester GL1 1EL
Tel Gloucester
(0452)28691
Telex 43521

For the attention of Mr. R. C. Hopkins,

13th February 1979

Dear Sirs,

COMPAGNIE DES BAUXITES DE GUINEA

We write to you as the authorised London Agents of The Chiyoda U.K. Insurance Company Ltd.

We have to inform you that this Company has never at any time either before, during or after the period specified by the Court written Insurance Policies for business emanating from North America. We will not therefore be involved on any policies for insureds in Pennsylvania or for risks located in Pennsylvania. The policy for Compagnie des Bauxites de Guinea was accepted on the basis that it was an insurance located in Africa and there was no known connection with Pennsylvania when the risk was accepted.

Similarly, this Company has never written business through Brokers located in Pennsylvania but has dealt solely with Brokers located in London. There would be no way of knowing when the London Market Broker was acting on behalf of a Broker located in Pennsylvania.

Yours faithfully,
W. F. Morrey
For and on behalf of The
Chiyoda (UK)
Fire & Marine Insurance
Co. Ltd.

WILLIS, FABER & DUMAS Ltd.
Insurance Brokers and
Underwriters

Ten Trinity Square
London EC3P 3AX
(and at Lloyd's)

I.P. Hammersley Esq.
Senior Underwriter,
Stronghold Insurance Co.Ltd.
40 Lime Street
LONDON EC3M 5BH.

Telephone: 01-488-8111 (SWITCHBOARD)
01-488 8378 (DIRECT LINE)
Telex: 882141
Cables/Telegrams: Willis London EO

31st January 1979

Dear Peter,

BUSINESS EMANATING FROM U.S.A.

Your letter dated 22nd January concerning Businss Emanating from Pennsylvania has been passed to me for comment and action.

I am sure you realise that we are only too anxious to help you as much as we can but, frankly, the enormous detail and work involved in producing all the information required by the Pennsylvania Court is simply beyond us at this time.

Please understand we are not being destructive but we must face the fact that this firm puts through thousands of policies and certificates in the course of a year and even if we had the manpower available, I doubt very much whether we could produce with any degree of accuracy what you require.

I do hope you understand our position and if you would like me to discuss this with you in your office, I should be pleased to come at any time convenient to you.

Yours sincerely,
DEREK J. MORTON
Managing Director
North American
Reinsurance Division

THOMPSON GRAHAM
Lloyd's Brokers

Thompson, Graham & Co. Ltd.
19 Eastcheap,
London EC3M 1HJ.
Telephone: 01-623 4611
Telex: 8814844 JMIB
Telegraphic Address:
Thomgram London EC3

SGHG/JB

5th February, 1979

Stronghold Insurance Co. LTD.,
40 Lime Street,
London EC3M 5BH

For the attention of I P Hammersley—Senior Underwriter

Dear Sirs,

BUSINESS EMANATING FROM U.S.A.

We wish to thank you for your letter of 22nd January 1979 in connection with the above.

We have run a computer search and, to the best of our knowledge and belief, it would appear that there are no risks which we have placed with your company during the period 1st January 1972 through to the 27th July 1978.

We would of course point out that when acting as reinsurance brokers we would have no record of any reinsurance bound under a Treaty and/or Excess of Loss Contract which included risks in Pennsylvania, or which may have been placed with a Ceding company by a broker located in Pennsylvania.

We trust that the above is sufficient for your needs.

Yours faithfully,
S G H GREEN
Director

JOSEPH
HADLEY
(Insurance) Ltd

Sophia House
76/80, City Road, London EC1Y 2DR

and at Lloyds:
Cable address: Joshadle', London EC1
Telephone: 01-253-4333
Telex: 21678

7th February 1979 Your ref: Our ref:

Mr. I.P. Hammersley,
Senior Underwriter,
Stronghold Insurance Company Ltd.,
40 Lime Street,
London EC3M 6BH.

Dear Sir,

BUSINESS EMANATING FROM U.S.A.

With reference to your recent letter requesting certain information concerning risks involving the State of Pennsylvania.

Whilst we fully appreciate the importance of the Pennsylvania Court ruling, referred to in your letter, and the possible repercussions should you not comply, we have to inform you that in keeping with normal broking practice, we do not keep records in a form which would enable us to extract the information you require.

To do so would entail a physical examination of every direct U.S.A. risk placed by us over the relevant period, and with the staff situation such as it is today we must regretfully advise that as much as we would like to help you, we do not feel able to carry out such a task.

We trust you will understand and accept our position in this matter, which we believe to be similar to other London Brokers.

Yours very truly,
RODWELL A. PEEK
Director

Directors: Ronald D. Hadley (Chairman) W.H. Dubois (Managing) L.G.W. Cosham (Managing) D.B. Bailey G.J. James P.F. Hepburn R.A. Peek Company Secretary: A.R. Amor, FCIS

Robt Bradford Hobbs Savill LTD
Insurance Brokers

Registered office
2 London Bridge London SEl 9RB and at Lloyd's
Telephone 01-407 5555 (43 lines) Telex 884944
Cables Bradloyd London SE1

Your ref Our ref 2/KFB/JMK Date 8th February, 1979

Stronghold Insurance Co., Ltd.,
40, Lime Street
LONDON EC3M 5BH

For the attention of I.P. Hammersley, Esq.

Dear Sirs,

BUSINESS EMANATING FROM PENNSYLVANIA

We would like to thank you for your letter in connection with the above and would advise you that, to the best of our knowledge, there does not appear to be any business which you have written to us emanating from the State of Pennsylvania.

We must advise you, however, that, in contracts or treaties on which you may participate, this exposure might be involved, but there is no way in which we can discover this.

We trust that this is of assistance to you.

Yours faithfully,
ROBT BRADFORD HOBB
SAVILL LTD.
K.F. BROOKS
Director

ROBERT BARROW LIMITED
LLOYD'S INSURANCE BROKERS
Telegrams Registered Address Telephone: 01-709 9611
Barrobie 69-70 Mark Lane - London EC3R 7HY Telex
London EC3and at LLOYD'S 885576
Registered No. 186593 ENGLAND

Our Ref: JCR/BG

A. J. Plummer, Esq.,
Manager,
Non-Marine Claims Department,
English & American Insurance Co. Ltd.,
60 Fenchurch Street,
London, EC3M 4AQ. 26th January 1979.

Dear Mr. Plummer,

RE: BUSINESS EMANATING FROM U.S.A.

Thank you for your letter dated 11th January 1979, requesting information as more fully outlined in your correspondence.

I regret to advise you that it would be quite impossible for us to provide this information due to sheer volume. In addition, as a professional body, we regard our policies and our information regarding Assureds as privileged and confidential.

I regret that I can be of no assistance.

Yours sincerely,
JEREMY C. RICHARDS
Assistant Director
North American
Department

GRINDLAY BRANDTS INSURANCE
BROKERS LIMITED
Lloyds Brokers

Our Ref: PVP/LAH
Your Ref: AJP/P10

St. Clare House
30-33 Minories
London EC3N 1DD
and at Lloyd's
Telephone 01-488-1388
Telex 883485
Cables Brandinsur, London
Registered London 991636

English and American
Insurance Co. Ltd.,
60, Fenchurch Street,
London EC3M 4AQ.

Attention of: MR. A.M. PLUMMER

Reg. Office:
23 Fenchurch Street
London EC3P 3ED

17th January, 1979.

Dear Sir,

BUSINESS EMANATING FROM PENNSYLVANIA U.S.A.

With regard to your letter of the 15th January, 1979 I can advise you that we are able to trace only one risk and this falls in category "C" as designated therein.

Since we have not yet prepared the policy I enclose a copy of the slip which I trust will suffice.

There are no other outstanding items.

Yours faithfully,
PETER V. PRATT

TYPE:	Fire &/or Lightning &/or E.C. & or V.M.M.
FORM:	As Warranty Company t.b.a. L/U.
ASSURED:	George Ritter, Rt. 2 North Box 211, Millersville, Maryland.
PERIOD:	Twelve months at 21st December, 1978.
INTEREST:	1) Building 2) Contents
SUM INSURED:	1) $150,000 2) $ 37,500
SITUATION:	361-65 Somerset Avenue, East Side, Princess Anne, Somerset Co. Maryland.
CONDITIONS:	Warranty Co. Great Southwest with $150,000 2) 37,500 Hereto Full Clause C.C. as per Warranty Co. 80% Co-Insurance Clause $250 ded. E. & E.L.
PREMIUM:	Calc 1) 1.89% 2) 2.78%
BROKERAGE:	Less 20% Plus taxes if and as applicable

WRITTEN _____ OF _____
LINES PART ORDER

Agree to renew by renewal policy without production of original slip or policy. L.U.A. (NMA). Increases up to written lines plus 10% by L/U and any one of the near five Underwriters. Wdgs, Schedules, ppsls, clauses, amendments, T.O.R. signings, offslips, deposit premiums and reductions in S/1 t.b.a. L/U only.

Adjustments to be taken down without being initialled by Underwriters and without production of premium calculations.

annual resigning slip t.b.a. two L U's.

COMPANIES SIGNING AGREEMENT

Companies hereon agree that authorisation forms in respect of this policy shall not be required it being understood that closing instructions of addenda will be sent to Companies, together with a form for return (if necessary) within 21 days of receipt showing any objection or change of administrative details; any amended reference to be quoted thereafter.

FENCHURCH

A Guinness Peat Group
Company

FENCHURCH GROUP
BROKERS
INTERNATIONAL
LIMITED

English & American Insurance
Company Ltd.,
60, Fenchurch Street,
London,
E.C.3M 4AQ.

For the attention of Mr.
A.J. Plummer
Manager Non-Marine Claims
Department

Lloyd's Brokers
136 Minories
London
EC3N 1QN
Telephone: 01-505 3333
Telex: 887004
Cables: Loquotefen
London EC3
Your reference
Our reference
70/GWC/FJE.
1st. February, 1979.

RE: BUSINESS EMANATING FROM U.S.A.

Dear Sirs,

We refer to your letter of the 11th January 1979 referring to certain proceedings in Pennsylvania whereby it is necessary for you to produce copies of all Policies within the categories listed in your letter.

We have made a careful review of our files and to the best of our knowledge the only Policies in which your Company participated and falling within those categories through our Office, are as per the attached photo copies.

Due to the complexity of this task, we cannot, however, guarantee that we have not missed any such Policies but we have as stated above made a very careful review of our files for this purpose.

If, on the other hand, your records show that you were interested in any further Policies falling within the Categories listed in your letter and which are not enclosed, upon receipt of your advices to this effect giving us details, we will be most happy to endeavour to trace the copy Policies in question.

Yours faithfully,
G.W. Croker
Directors

COMPANIES COLLECTIVE POLICY

In consideration of the Insured named in the Schedule hereto having paid premium set forth in the said Schedule to the Insurers who have hereunto subscribed their Names (hereinafter referred to as "the Insurers")

The Insurers hereby severally agree each for the proportion set against its name to indemnify the insured or the Insured's Executors, Administrators and Assigns against Loss, Damage or liability as more fully set forth in Policy No. * issued to the Insured by Lloyd's Underwriters covering the identical subject matter and risk (hereinafter called the "Co-insuring Policy"), during the period of Insurance stated in the said Schedule or during any subsequent period as may be mutually agreed upon between the Insured and the Insurers

*839/4/711/1936

PROVIDED that:

(1) the liability of the Insurers shall not exceed the limits of liability expressed in the said Schedule or such other limits of liability as may be substituted therefor by memorandum hereon or attached hereto signed by or on behalf of the Insurers.

(2) the liability of each of the insurers individually in respect of such loss shall be limited to the proportion set against its name.

(3) this Policy shall be subject to the same terms, provisions, conditions, and limitations as are contained in the Co-insuring Policy.

(4) ixIf the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this policy shall become void, and all claim thereunder shall be forfeited.

In Witness whereof I being a representative of the Leading Office which is duly authorised by the Insurers have hereunto subscribed my name on their behalf this Twenty Third day of May One Thousand Nine hundred and Seventy Five.

ENGLISH AND AMERICAN
INSURANCE CO. LTD.

THE INSURERS	PROPORTION	REFERENCE NUMBERS
English & American Insurance Company Ltd. (Leading Office)	19.69%	423275 037E
Excess Insurance Company Limited	9.05%	471840 A112 B

Date 17th day of March 1975
Policy No. 835/4/711/1936

THE SCHEDULE

The Insured FELIX PETITTA CLARA PETITTA
EDW AND MAY NIEMIEC
400 SPROUL STREET,
MCKEES ROCKS, PENNSYLVANIA.

Premium: U.S.$573.73 part of U.S.$1,942.20

The Liability FIRE LIGHTNING EXTENDED COVERAGE VANDALISM AND MALICIOUS MISCHIEF

The Interest Insured 29.54% part of 100% of the following:

Limit: U.S. $90,000.00

Interest: Building

Period of Insurance

From 1st day of February 1975 to 1st day of February 1976

Warranty Company & Line

PLAINTIFF'S EXHIBIT 1C

IN THE HIGH COURT OF JUSTICE 1979-1.-No.
QUEEN'S BENCH DIVISION

Prentice-Hall
Received March 30, 1979
[signature illegible]

BETWEEN:-

THE INSURANCE CORPORATION OF IRELAND LIMITED	First Plaintiffs
EAGLE STAR INSURANCE COMPANY LIMITED	Second Plaintiffs
HANOVER INSURANCE COMPANY	Third Plaintiffs
CONTINENTAL ASSURANCE COMPANY OF LONDON LIMITED	Fourth Plaintiffs
THE CENTURY INSURANCE COMPANY LIMITED	Fifth Plaintiffs
YUVAL, THE INSURANCE COMPANY OF ISRAEL LIMITED	Sixth Plaintiffs
HOME INSURANCE COMPANY	Seventh Plaintiffs
SLATER WALKER INSURANCE COMPANY LIMITED	Eighth Plaintiffs
YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.) LIMITED	Ninth Plaintiffs
NICHIDO FIRE AND MARINE INSURANCE COMPANY LIMITED	Tenth Plaintiffs
TUREGUM INSURANCE COMPANY	Eleventh Plaintiffs

SAHAR INSURANCE COMPANY LIMITED	Twelfth Plaintiffs
EXCESS INSURANCE COMPANY LIMITED	Thirteenth Plaintiffs
TRIDENT INSURANCE COMPANY LIMITED	Fourteenth Plaintiffs
VESTA (U.K.) LIMITED	Fifteenth Plaintiffs
CHIYODA FIRE AND MARINE INSURANCE COMPANY LIMITED	Sixteenth Plaintiffs
STRONGHOLD INSURANCE COMPANY LIMITED	Seventeenth Plaintiffs
BRITISH RESERVE INSURANCE COMPANY LIMITED	Eighteenth Plaintiffs
ENGLISH AND AMERICAN INSURANCE COMPANY LIMITED	Nineteenth Plaintiffs
CONSOLIDATED EUROPEAN REINSURANCE COMPANY LIMITED	Twentieth Plaintiffs
L'UNION ATLANTIQUE S.A. D'ASSURANCES	Twenty-first Plaintiffs

– and –

COMPAGNIE DES BAUXITES DE GUINEE (a Corporation)	Defendants

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith:

TO: COMPAGNIE DES BAUXITES DE GUINEE
Office for service of Process:
Prentice-Hall Corporation Systems Inc.,
229 South State Street,
Dover, Delaware, U.S.A.

WE COMMAND YOU that within 22 days after the service of the notice of this Writ on you, inclusive of the day of service, you do cause an Appearance to be entered for you in an action at the suit of:

THE INSURANCE CORPORATION OF IRELAND LIMITED
EAGLE STAR INSURANCE COMPANY LIMITED
HANOVER INSURANCE COMPANY
CONTINENTAL ASSURANCE COMPANY OF LONDON LIMITED
THE CENTURY INSURANCE COMPANY LIMITED
YUVAL, THE INSURANCE COMPANY OF ISRAEL LIMITED
HOME INSURANCE COMPANY
SLATER WALKER INSURANCE COMPANY LIMITED
YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.) LIMITED
NICHIDO FIRE AND MARINE INSURANCE COMPANY LIMITED
TUREGUM INSURANCE COMPANY
SAHAR INSURANCE COMPANY LIMITED
EXCESS INSURANCE COMPANY LIMITED
TRIDENT INSURANCE COMPANY LIMITED
VESTA (U.K.) LIMITED
CHIYODA FIRE AND MARINE INSURANCE COMPANY LIMITED
STRONGHOLD INSURANCE COMPANY LIMITED
BRITISH RESERVE INSURANCE COMPANY LIMITED
ENGLISH AND AMERICAN INSURANCE COMPANY LIMITED
CONSOLIDATED EUROPEAN REINSURANCE COMPANY LIMITED

L'UNION ATLANTIQUE S.A. D'ASSURANCES

and take notice that in default of your so doing the Plaintiffs may proceed therein, and judgment may be given in your absence.

Witness, FREDERICK BARON ELWYN-JONES, Lord High Chancellor of Great Britain, the day of March, 1979.

Note: This Writ may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The Defendant may enter an appearance by a Solicitor either (1) by handing in the appropriate forms, duly completed, at the Central Office, Royal Courts of Justice, Strand, London, WC2, or (2) by sending them to that office by post. The appropriate forms may be obtained by sending a postal order for 14p with an addressed envelope, foolscap size, to the Clerk of Accounts, Vote Office, Royal Courts of Justice, Strand, London, WC2.

If the Defendant enters an appearance, then, unless a Summons for judgment is served on them in the meantime, they must also serve a Defence on the Solicitors for the Plaintiffs within 14 days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against them without notice.

STATEMENT OF CLAIM

1. At all material times the Defendants' business included the mining, transport and processing of bauxite ore in Guinea. The processing plant included a tippler/crusher system at Kamsar.

2. By a Contract of Insurance made between the Plaintiffs and the Defendants and contained in two placing slips numbered Policy No. 40930110000 (one relating to the First to Twentieth Plaintiffs inclusive, the other to the Twenty-first Plaintiffs) initialled by each of the Plaintiffs the Plaintiffs severally (in the proportions written on the slips) agreed to indemnify the Defendants against losses caused by business interruptions due to damage to (inter alia) the processing plant referred to above in the sum of U.S. $10,000,000 in excess of U.S. $10,000,000 each and every loss in form to be "as underlying as far as applicable" from 12th February 1974.

3. The underlying Policy of Insurance was issued by the Insurance Company of North America ("INA").

4. Prior to the making of the above Contract of Insurance the Defendants themselves and/or their agents and brokers Bland Welch & Co. Limited failed to disclose that:

a) the Insurance had a substantial United States connection

b) United States brokers were concerned with the placing of the Insurance

c) The defendants were incorporated in Delaware in the United States

d) aluminium manufacturers in the United States were substantial shareholders in the Defendants

e) the Policy issued by INA had been issued by them not on the London Insurance Market but at Philadelphia, Pennsylvania

f) the INA Policy contained no material damage warranty. (It is standard practice in the London Insurance Market in this class of business to require a material damage warranty in any business interruption policy) and/or

g) from about the beginning of October 1973 serious problems had developed in the tippler/crusher system at Kamsar which were substantially affecting production.

5. The facts set out in paragraph 4 above were material facts known to the Defendants and/or their agents Bland Welch & Co. Limited and were unknown to the Plaintiffs and each of them.

6. In the premises the Plaintiffs and each of them are entitled to avoid the Contract of Insurance referred to in paragraph 1 above and elected so to do by letter dated 19th March, 1979 to the Defendants.

7. The Defendants have contended that the Plaintiffs are not entitled to avoid the Contract of Insurance.

AND the Plaintiff claims:

a) A declaration that they are entitled to avoid the Contract of Insurance.

b) An order that the Contract of Insurance be and is avoided.

SIMON TUCKLEY

ISSUED this 20th day of March, 1979 by Davies Arnold & Cooper of 4/7 Salisbury Court, London EC4.

Solicitors for the Plaintiffs whose registered offices are:—

The Insurance Corporation
of Ireland Limited,
Dame Street,
Dublin 2

Eagle Star Insurance
Company Limited,
1 Threadneedle Street,
London EC2R 8BE.

Hanover Insurance Company,
Worcester,
Massachusetts,

Continental Assurance
Company of London Limited,
Fountain House,
125/135 Fenchurch Street,
London EC3M 5DC.

The Century Insurance
Company Limited,
31 St. Andrew Square,
Edinburgh EH2 2QS.

Yuval, The Insurance
Company of Israel Limited,
44 Rothschild Boulevard,
Tel Aviv,
Israel.

Home Insurance Company,
72 Market Street
Manchester,
New Hampshire,
U.S.A.

Slater Walker Insurance
Company Limited,
Circle House,
30 Uxbridge Road,
Shepherds Bush,
London W12 8BG.

Yasuda Fire and Marine
Insurance Company (U.K.)
Limited
Dunster House,
Mark Lane,
London EC3P 3AD.

Nichido Fire and Marine
Insurance Company Limited
Dunster House
Mark Lane
London EC3P 3AD.

Turegum Insurance Company
2 Mythenquai, 8022 Zurich,
Switzerland

Sahar Insurance Company
Limited,
Sahar House,
23 Ben-Yehuda Street,
Tel Aviv,
Israel.

Excess Insurance
Company Limited,
Excess House,
13 Frenchurch Avenue,
London EC3M 5BT.

Trident Insurance
Company Limited,
Trident House
Russell Street,
Gloucester GL1 1EL

Vesta (U.K.) Limited
37/39 Lime Street,
London EC3.

Chiyoda Fire and Marine
Insurance Company Limited,
19 Hanover Square,
London W1A 1DU.

Stronghold Insurance
Company Limited,
Surrey Street,
Norwich NR1 3LH

British Reserve Insurance
Company Limited,
Market Buildings,
29 Mincing Lane,
London EC3R 7EP.

English and American
Insurance Company
Limited,
The Bowring Building,
Tower Place,
London EC3.

Consolidated European
Reinsurance Company
Limited,
11 Poultry,
London EC2 SEN.

L'Union Atlantique S.A.
D'Assurances,
Rue Belliard 7,
1040 Brussels.

The First, Sixth, Eleventh, Twelfth and Twenty-First Plaintiffs are registered outside the Scheduled Territories for the purpose of the Exchange Control Act 1947.

PLAINTIFF'S EXHIBIT 3

Annual Statement for the Year 1975
of the U.S. Branch Eagle Star Insurance Co. Ltd.

Schedule T -Exhibit of Premiums Written
Allocated by States and Territories

Gross premium including
Agency and Membership Fees

(2) Direct Premiums Written	*(3)* Direct Premiums Earned	*(5)* Direct Losses Paid (including salvage)	*(6)* Direct Losses Incurred	*(7)* Direct Losses Unpaid
108,225	110,148	50,341	42,433	39,275

PLAINTIFF'S EXHIBIT 4

Annual Statements for the years 1971-1978
of the Hanover Insurance Company

Schedule T -Exhibit of Premiums Written
Allocated by States and Territories
[Figures for all but Pennsylvania omitted]

Gross premium including
Agency and Membership Fees

Year	*(2)* Direct Premiums Written	*(3)* Direct Premiums Earned
1971	4,135,241.77	4,086,979.32
1972	4,571,681.97	4,432,657.72
1973	4,607,066.40	4,337,955.21
1974	3,702,633	3,986,902
1975	4,188,528	4,106,296
1976	4,124,300	4,404,063
1977	4,347,777	4,456,849
1978	3,959,698	4,022,985

(5) *Direct Losses Paid (deducting salvage)*	(6) *Direct Losses Incurred*	(7) *Direct Losses Unpaid*
2,640,800.89	2,287,383.89	1,887,807.60
2,392,183.48	2,655,050.48	2,150,669.00
2,031,173.04	2,708,790.04	2,878,286.00
2,559,113	2,734,548	3,005,721
3,414,916	3,082,681	2,673,486
2,737,776	3,021,980	2,957,690
3,335,164	3,419,117	5T3,041,643
2,759,289	3,404,810	4,297,448

PLAINTIFF'S EXHIBIT 5
(THIRD AFFIDAVIT OF DALE HERSHEY)

A-F-F-I-D-A-V-I-T

COMMONWEALTH OF PENNSYLVANIA } ss:
COUNTY OF ALLEGHENY: }

Before me, the undersigned authority, appeared DALE HERSHEY, who, after being duly sworn by me, deposed and said that:

1. He is a member of the firm of Eckert, Seamans, Cherin & Mellott, counsel to Plaintiff (hereinafter "CBG") in this action against the Insurance Company of North America and twenty-one other insurance companies, those twenty-one companies being referred to hereinafter as the "Excess Insurer Defendants" or as "Excess Insurers."

2. He makes this affidavit in support of the motion for sanctions filed on behalf of CBG on February 23, 1979. CBG's motion for sanctions is based upon the failure of the Excess Insurer Defendants to produce documents showing the extent of their business contact with Pennsylvania, which they were ordered to produce by the Court on July 27, 1978, November 8, 1978 and December 21, 1978. Part I of this Affidavit contains a chronology showing the failure of the Excess Insurers to produce documents and to make any timely or adequate attempt to obtain them for production. Part II of this affidavit will state facts about the documents which were produced, to show the inadequacy of the production.

PART I

CHRONOLOGY

3. The following is a chronology of the events connected with the Court's orders directing the Excess Insurer Defendants to produce documents:

JULY 27, 1978 The Court ordered the Excess Insurer Defendants to identify all of the insurance coverage which they had written since 1971 in which they provided coverage for Pennsylvania insureds, or in which they covered risks located in Pennsylvania, or in which they provided coverage through brokers located in Pennsylvania, and it ordered them to produce this information for the plaintiff, in response to the plaintiff's request for insurance policies and cover notes of this description. The production was to be made within ninety days.

OCTOBER 25, 1978 On this 90th day after July 27, the Excess Insurer Defendants sought an extension of time "to answer interrogatories." Their motion says, "counsel has sought to secure the information necessary to answer plaintiff's interrogatories and will probably be able to complete the answers within thirty days from this date." On the basis of this representation, the Court granted their motion on November 8.

NOVEMBER 24, 1978 Instead of producing documents, the Excess Insurers filed an affidavit of Mark F. Bruckman. The affidavit states that Mendes & Mount had "individually contacted " 15 of the 21 Excess Insurers in an attempt to obtain copies of insurance policies regarding Pennsylvania business. The affidavit states that the insurers do not prepare or receive copies of insurance policies, that they do not index the risks they cover by states, and that they "are unable, without reviewing approximately 4 million files to deterrine if the insured risk was derived in some fashion from Pennsylvania."

The Exhibit attached to the affidavit indicates that the 15 Excess Insurers contacted had reviewed their files at least to the extent of being able to estimate the number of those files available for inspection in order to determine if the source of business was from Pennsylvania. The number of such files ranged from 20,000 in the cases of British Reserve to 3,000,000 to 4,000,000 in the case of the Excess Insurance Companies.

DECEMBER 21, 1978 The Excess Insurers were ordered to produce documents within 60 days upon penalty of being subected to sanctions under Rule 37.

JANUARY 1979 The Excess Insurers sent form letters to London brokers with whom they dealt, asking the brokers to provide them with the documents to be produced. From the responses of brokers it appears that most of these letters were not sent out until mid or late January, six months after the original order to produce. A copy of the form letter is attached hereto as Exhibit A.

FEBRUARY 19-20, 1979 Fourteen of the Excess Insurers produced some documents on this 60th day of the order of December 21, 1978. The vast majority of these documents consists of correspondence with brokers. The substance of this production is outlined in Part II of this Affidavit.

MARCH 20, 1979 Sixteen of the Excess Insurers produced further documents consisting almost entirely of copies of form letters to brokers. The substance of this production is outlined in Part II.

MARCH 22, 1979 Two of the Excess Insurers made supplemental production of documents consisting almost entirely of copies of form letters sent to brokers. The substance of this production is outlined in Part II.

PART II

DOCUMENTS WHICH WERE PRODUCED

4. Seven of the Excess Insurer Defendants produced no documents whatsoever on February 19 and 20, 1979, which was the time by which documents must have been produced under the Court's order if sanctions were to be avoided. Those seven companies are Hanover Insurance Company; The Century Insurance Company, Ltd.; Yuval, The Insurance Company of Israel, Ltd.; Home Insuaance Co., Ltd.; Slater, Walker Insurance Co. Ltd.; Yasuda Fire & Marine Insurance Co. (UK) Ltd.; and Nichido Fire & Marine Insurance Co. Ltd. Four of these seven companies produced some documents on March 20, 1979, though they were not the documents which the Court ordered them to produce. Those four companies are Hanover Insurance Company; Slater, Walker Insurance Co., Ltd.; Yasuda Fire & Marine Insurance Co. (UK) Ltd.; and Nichido Fire & Marine Insurance Co. Ltd. The other three, The Century Insurance Co. Ltd.; Yuval, The Insurance Company of Israel, Ltd; and Home Insurance Co., Ltd., have not produced any documents at any time.

5. Two of the Excess Insurer Defendants not only failed to produce any documents but failed to make any attempt to get policies from brokers. Those two companies are Yuval, The Insurance Company of Israel, Ltd. and The Century Insurance Co. Ltd. See page 3 of the Excess Insurer Defendants' Brief filed on March 19, 1979.

6. The Excess Insurer Defendants do not argue that they produced the documenss which the Court ordered them to produce, but they argue instead that they attempted to get the documents from London brokers, almost all of whom "refused" to search their files for the

documents. See the Excess Insurer Defendants Brief filed March 19, 1979, page 3.

7. As shown by the foregoing chronology and by the form letter which the Excess Insurers sent to the brokers, a copy of which is attached hereto as Exhibit A, the Excess Insurer structured their response to the Court's orders in such a way that the document production was bound to be inadequate. Though they were ordered to produce material on July 27, 1978, they did not write the letters to the brokers until mid-January, 1979, and then they gave the brokers less than one month to gather the documents for them. They offered the brokers no financial assistance, no staff assistance, no policy numbers to guide them in their search, and no other support. The inadequate results could only have been expected.

8. The Insurance Corporation of Ireland, Ltd. produced fifty-four documents on February 19 and 20, 1979. Only ten of those documents were policies, cover notes, or placing slips. Six of the placing slips showed coverage by the Insurance Corporation of Ireland for Pennsylvania Power & Light Company. Four documents were letters from brokers who reported that they had found policies in their files of the type requested by the Court, but they did not supply copies of those policies. Some of the brokers stated that they might be able to supply documents if they were given more specific information by the Insurance Corporation of Ireland about the documents to be produced.

9. Defendant Eagle Star Insurance Company produced no insurance policies. It did produce documents summarizing the extent of the business which it wrote in the United States in the years 1972 through 1977. The total amount of this business was $116,902,342.89. The

total business written in Pennsylvania during this period, measured by premium income, was $797,515.82. In the year in which this action was brought, 1975, Eagle Star Insurance Company wrote $108,255 in premiums in Pennsylvania.

10. Continental Assurance Company of London, Ltd. produced seventeen documents on February 19 and 20, 1979, but produced no policy or cover notes. The documents consist of rssponses from brokers, the vast majority of which say they cannot comply with the request under the circumstances.

11. Turegum Insurance Company produced forty-nine documents but no insurance policies or cover notes on February 19 and 20, 1979. One broker responded saying that he was attaching two policies within the scope of the Court's order to his letter but no such policies were attached. The great majority of the responses weee statements that the brokers could not comply under the circumstances.

12. Sahar Insurance Company, Ltd. produced 49 documents, but no policies or cover notes. The vast majority of the documents are responses from brokers saying that they cannot comply under the circumstances.

13. Excess Insurance Company, Ltd. produced 43 documents on February 19 and 20, 1979. Five of the documents were policies representing business written by this defendant in Pennsylvania. Four of the policies show participation by two other Excess Insurer Defendants, English and American Insurance Company, Ltd. and Yasuda Fire & Marine Insurance Co. (UK) Ltd., but neither of those defendants produced copies of these four policies. Sixteen of the documents produced by this defendant are letters from brokers saying that they cannot comply under the circumstances.

14. Trident Insurance Company, Ltd. produced 9 documents but no insurance policies or cover notes on February 19 and 20, 1979. Brokers stated that they could not comply under the circumstances.

15. Vesta (UK) Ltd. and Chiyoda Fire & Marine Insurance Co. Ltd. of Tokyo produced only letters from the defendants, not from brokers, saying that no documents of the description in the Court's order exist.

16. Stronghold Insurance Co. Ltd. produced 74 documents but no insurance policies or cover notes on February 19 and 20, 1979. Thirty-three of these documents were copies of the request letter which was sent to brokers, the copies being marked "No Reply Received." Brokers who did reply most often stated that they could not comply with the request.

17. British Reserve Insurance Co. Ltd. produced 56 documents but no insurance policies or cover notes on February 19 and 20, 1979. Half of the documents produced were copies of cover letters sent to brokers. Many of the brokers who replied said that they could not comply under the circumstances.

18. English & American Insurance Company, Ltd. produced 131 documents, including 15 policies and 55 placing slips showing business written in Pennsylvania. Other insurers who participated in some of this underwriting but did not produce the policies or placing slips are Excess Insurance Co., Ltd.; Slater, Walker Insurance Co. Ltd; Yasuda Fire & Marine Insurance Co. (UK) Ltd.; and Nichido Fire & Marine Insurance Co. Ltd. Many of the brokers who replied said they could not comply under the circumstances.

19. Consolidated European Reinsurance Co., Ltd. produced 32 documents, two of which were policies

showing business written in Pennsylvania. Many brokers replied saying they could not comply under the circumstances.

20. L'Union Atlantique S.A. D'Assurances produced 50 documents but no insurance policies or cover notes. Thirty four of the documents produced were copies of request letters sent to brokers. Many brokers responded saying they could not comply under the circumstances.

21. On March 20, 1979, one month after the expiration date set by the Court for the production of documents, a supplemtnaal production of documents was made by 16 of the 21 Excess Insurer Defendants. Only one of those 16 produced any documents of the type within the scope of the Court's order, that defendant being Excess Insurance Company, which produced 46 cover notes showing business written in Pennsylvania. Nine of the 16 excess Insurers produced no documents of substance, but only submitted copies of request letters which they had sent to brokers, and in some cases, lists of brokers to whom the letter was sent. The remaining Excess Insurer Defendants produced broker responses, most of which were statements to the effect that the brokers could not comply under the circumstances.

22. A final production of documents was made on March 22, 1979. Turegum Insurance Company produced 27 policies showing business written in Pennsylvania. It also produced 7 responses of brokers, two of which refer to particular business written in Pennsylvania without attaching policies or cover notes. Slater, Walker Insurance Company, Ltd. also produced one broker response on March 22, 1979.

23. Though all of the Excess Insurers with the exception of Yuval, The Insurance Company of Israel, Ltd.; Vesta (UK) Ltd.; and Chiyoda Fire & Marine Insurance

Co. Ltd. of Tokyo, have written coverage for CBG and Halco (Mining) Inc., none of them produced policies or cover notes connected with this underwriting in response to the Court's order.

DALE HERSHEY

[Jurat not printed]

PLAINTIFF'S EXHIBIT 7

Non-Disclosure

that of a bailee.[8] Nor is it material that he has entered into a contract with a third person by which, in the event of the property proposed to be insured being lost or injured by such person, his right of action is restricted.[9] Further, in the case of motor insurance, it has been held not material that the assured had not had a driving licence for some years.[10]

Any such fact may, however, become material if made the subject of a specific question.[11]

It is further to be noted that facts are material, not in the abstract, but only as bearing upon the particular insurance proposed. The fact, therefore, which may be regarded as material in the ordinary course of insurance business, may be, in the special circumstances of the case, immaterial, e.g. where the fact lessens the risk, or falls within a condition or exception in the policy, or where the insurers waive its disclosure, or elect to make inquiries themselves.[12]

---

[8] *London and North Western Railway Co. v. Glyn* (1859) 1 E. & E. 652 (fire insurance) *per* Crompton, J., at p. 664.

[9] *Tate v. Hyslop* (1885), 15 Q.B.D. 368, C.A. (marine insurance) *per* Brett, M.R., at p. 375. It is otherwise where the proposed assured knows that the insurers regard the existence of such a contract as material and vary the rate of premium accordingly: ibid.

[10] *Corcas v. De Rougemont* (1925), 23 Ll.L. Rep. 164 (motor insurance).

[11] See pp. 148-150, post.

[12] See p. 125, post.

G Facts Which Need Not Be Disclosed

Facts which would, in ordinary circumstances, be material, may become immaterial in the special circumstances of the case; and the assured is then under no obligation to disclose them.[13] Facts which may thus become immaterial may be grouped under the following classes:

1 Facts which are known to the insurers or which they may reasonably be presumed to know.
2 Facts which they could have discovered by making inquiry.
3 Facts as to which they waive information.
4 Facts tending to lessen the risk.
5 Facts the disclosure of which is unnecessary by reason of a condition.

1 Facts within Actual or Presumed Knowledge of Insurer

a *Actual Knowledge*

"There are many matters as to which the insured may be innocently silent—he need not mention what the underwriter knows—*Scientia ulrinque par pares contrahentes facit.* An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew; what way soever he came to the knowledge."[14]

So where the secretary of an insurance company, which had guaranteed the solvency of a third party, knew that he was in financial embarrassment, it was held that the company could not avoid liability on the ground that the insured had not disclosed this fact.[15]

---

[13] *The Bedouin,* [1894] P. I. C.A. (marine insurance) *per* Lord Esher, M.R., at p. 12.

[14] *Carter v. Boehm* (1766), 3 Burr. 1905 at p. 1910 (*per* Lord Mansfield).

As far as marine insurance is concerned, the Marine Insurance Act 1906, s. 18 (3), provides:

> "[The underwirter] needs not to be told general topics of speculation: as for instance—the underwriter is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils; from the ruptures of States from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels or their want of strength, etc."[2]
>
> "It is also true that when a fact is one of public notoriety, as of war . . . the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows."[3]

Thus, in *Leen v. Hall*[4] a castle in County Kerry in Ireland was insured against damage from riot, civil commotion, war, rebellion and fire. It was destroyed in May 1921 by members of the Irish Republican Army during the troubles of that year. In an action on the policy the insurer pleaded that the insured had not disclosed that the castle had been occupied for short periods during that year by Crown Forces and that it had been used by them for the detention of Sinn Fein prisoners. The jury found that it was not material to communicate these facts, presumably because they considered that they were common knowledge.

---

[15] *Anglo-Californian Bank, Ltd. v. London and Provincial Marine and General Insurance Co., Ltd.* (1904), 10 Com. Cas. 1.

[2] *Carter v. Boehm* (1766), 3 Burr. 1905 at p. 1910 (*per* Lord Mansfield).

[3] *Bates v. Hewitt* (1867), L.R. 2 Q.B. 595 at p. 605.

[4] (1923), 16 L.L. Rep. 100, K.B.

The insured is not bound to tell the underwriter what the law is.[5]

As far as marine insurance is concerned, the Marine Insurance Act 1906 s. 18 (3), states:

> "In the absence of inquiry the following circumstances need not be disclosed, namely:— . . .(b) any circumstance which is . . . presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know."[6]

2 Facts within Constructive Knowledge of Insurer

Actual knowledge is not essential if the insurer knew that he had the means of knowing the fact. If, for example, he knew that he could learn at Lloyd's the exact cargo which had been shipped, and chose not to ascertain it, it would be considered to be within his knowledge.[7]

---

[5] The Bedouin, [1894] P. 1 at p. 12 (*per* Lord Esher, M.R.).

[6] See further, Ivamy, *Marine Insurance* (2nd Edn. 1974). pp. 47-51.

If the insurer chooses to neglect the information which he receives, he cannot take advantage of his willful blindness or negligence. If he shuts his eyes to the light, it is his own fault provided sufficient information, as far as the insured is concerned, has been placed at his disposal,[8] but the insured is still under a duty to communicate a material fact which is known to him, even though the underwriter might "by an effort of memory and of reasoning applied to the information actually communicated" have arrived at the knowledge of the material fact concerned.[9]

---

[7] *Foley v. Tasor* (1861), 2 F. & F. 663 at p. 672 (per Erle, C.J.).

[8] *Bates v. Hewitt* (1867), L.R. 2 Q.B. 595 at p. 605 (*per* Cockburn, C.J.).

[9] *Ibid*, at p. 609 (*per* Mellor, J.).

PLAINTIFF'S EXHIBIT 8

AFFIDAVIT OF ROBERT W. DOTY

COMMONWEALTH OF PENNSYLVANIA } ss:
COUNTY OF ALLEGHENYS }

Before me, a notary public in and for the above state and county, personally appeared the undersigned, Robert W. Doty, who, being duly sworn according to law, did depose and say as follows:

1. He is a partner in the law firm of Eckert, Seamans, Cherin & Mellott, leqal counsel for the Plaintiff in the above-entitled action.

2. He is familiar with the pretrial discovery in this action and has personally participated in most of this discovery.

3. In addition to extensive interrogatories and requests for admission, there have been a substantial number of depositions taken for purposes of this action and the related actions at Nos. 75-1568 and 75-1228. As shown by the list attached as Exhibit "A", these depositions have been taken in Pittsburgh, New York, Atlanta, Brussels and London.

4. As shown by Exhibit "A", as of October 29, 1979 65 depositions totalling more than 7,000 transcript pages have been taken. The depositions taken in Pittsburgh presently total 3,558 pages. The depositions taken in London total 1,424 pages, while the depositions taken in other cities presently total 2,250 pages. The deposition of John Unver which was recently taken in New York has not yet been transcribed. Also, 11 additional depositions have been scheduled for November and December, 1979, and all of these remaining depositions will be taken in cities other than London.

5. The pretrial discovery in this action has included the production of approximately 15,000 documents. These have been produced pursuant to requests for production and subpoenas *duces tecum* in Pittsburgh, New York, Atlanta, Brussels, Guinea and London. The vast majority of these documents were produced in Pittsburgh or Guinea, and all of the documents are now assembled in Pittsburgh. It is estimated that approximately 1,500 of these documents were produced in London.

6. At the trial of this action, the Plaintiff does not intend to call as witnesses in its direct case any persons residing in London or Great Britain. To the best of my knowledge and belief, most or all of the witnesses who may be called by the Defendant, INA, reside in Pennsylvania or New York. The persons from London or Great Britain whom the excess insurer defendants might be expected to call as witnesses have been deposed, and they are for the most part employed by and thus within the control of the excess insurer defendants. None of the persons whom CBG may call as witnesses in its direct case are within the jurisdiction of the courts in London and Great Britain.

ROBERT W. DOTY

[Jurat not printed]

DEPOSITIONS TAKEN AS OF OCTOBER 29, 1979

Transcript Pages
Pittsburgh Depositions -3,558
New York Depositions -1,535
London Depositions -1,424
Brussels Depositions -587
Atlanta Depositions -128

Depositions
G. O . OLYSLAGER (60 pgs.)
Brussels, Belgium
    February 28, 1978

CAPTAIN J. DEWEYS (119 pgs.)
Brussels, Belgium
    March 1-2, 1978

JAN DE MAN (9 pgs.)
Brussels, Belgium
    March 3, 1978

DONALD J. MARS (303 pgs.)
London, England
    March 9-10, 1978
    June 1, 1979

ANTHONY KAPROWSKI (597 pgs.)
New York, New York
    June 20-22, 1978
    July 5-6, 1978
    October 12-13, 1978

RODERICK D. BALSAM (207 pgs.)
New York, New York
    July 6, 1978
    October 6, 1978

MATTHEW SAIA (93 pgs.)
New York, New York
July 7, 1978
October 13, 1978

LEONARD JACOB, JR. (177 pgs.)
Pittsburgh, Pennsylvania
November 20, 1978

DAVID K. WAER (115 pgs.)
New York, New York
November 28, 1978

JOHN W. LAMPERT (861 pgs.)
Pittsburgh, Pennsylvania
December 12, 13, 14, 15,
18, 19, 21, 1978
January 15-17, 1979
April 9-10, 1979

MARIANO CRISTOBAL (96 pgs.)
Pittsburgh, Pennsylvania
January 4, 1979

HERCULES C. PAPPAS (553 pgs.)
Pittsburgh, Pennsylvania
January 29-31, 1979
February 1-2, 1979

HORACIO TISERA (172 pgs.)
Pittsburgh, Pennsylvania
February 14-15, 1979

A. O. WHITE, JR. (128 pgs.)
Atlanta, Georgia
February 22, 1979

JACOBUS M. DEN HARTOG (813 pgs.)
Pittsburgh, Pennsylvania
July 12-14, 1978
July 17-19, 1978

PHILIP RICHEY (56 pgs.)
Pittsburgh, Pennsylvania
August 25, 1978

AKOS SWIERKIEWICZ (227 pgs.)
Pittsburgh, Pennsylvania
August 31, 1978
September 1, 1978

ESMET WALLEY (18 pgs.)
Pittsburgh, Pennsylvania
March 28, 1979

RICHARD L. WILSON (12 pgs.)
Pittsburgh, Pennsylvania
March 28, 1979

JAMES F. FERGUSON (75 pgs.)
Pittsburgh, Pennsylvania
March 28, 1979

PAUL DUPONT (179 pgs.)
Brussels, Belgium
June 5-6, 1979

JEAN PIERRE NEIRYNCK (47 pgs.)
Brussels, Belgium
June 6, 1979

PIERRE PELT (78 pgs.)
Brussels, Belgium
June 7, 1979

MICHELE VERNIER (95 pgs.)
Brussels, Belgium
June 8, 1979

ROBERT GEDDIS (174 pgs.)
Pittsburgh, Pennsylvania
June 25, 1979

DONALD F. McINTOSH (174 pgs.)
Pittsburgh, Pennsylvania
June 27, 1979
October 16, 1979

JOHN DE JONGE (232 pgs.)
New York, New York
February 27-28, 1979

RICHARD W. HOPPE (121 pgs.)
New York, New York
March 13, 1979

E. M. KENDALL (101 pgs.)
New York, New York
March 15, 1979

J. T. MILLER (150 pgs.)
Pittsburgh, Pennsylvania
March 20, 1979

BARRY AUSTIN (32 pgs.)
London, England
July 16, 1979

YVES DE NYS (46 pgs.)
London, England
July 17, 1979

RICHARD A. SELLS (37 pgs.)
London, England
July 18, 1979

IVAN P. HAMMERSLEY (40 pgs.)
London, England
July 18, 1979

LORD GRANTLEY (23 pgs.)
London, England
July 19, 1979

PAUL E. MERISON (20 pgs.)
London, England
July 19, 1979

KEITH F. ARNOLD (56 pgs.)
London, England
July 20, 1979
August 2, 1979

BRYAN ROBERT BOND (39 pgs.)
London, England
July 20, 1979

IAN THOMPSON (24 pgs.)
London, England
July 23, 1979

JOHN GRACE (138 pgs.)
London, England
July 10, 1979
September 4-5, 1979

JOHN MORRIS HUMM (71 pgs.)
London, England
July 12, 1979

PETER D. DOWNS (118 pgs.)
London, England
July 13, 1979

RUSSELL C. HOPKINS (57 pgs.)
London, England
August 1, 1979
September 5, 1979

WILLIAM H. GILES (13 pgs.)
London, England
August 1, 1979

GRAHAM A. TOMASZKO (15 pgs.)
London, England
August 2, 1979

RAYMOND E. GROVES (21 pgs.)
London, England
August 2, 1979

ALAN D. PARSONS (6 pgs.)
London, England
July 12, 1979

PETER HEAD (53 pgs.)
London, England
August 20, 1979
September 6, 1979

ALESSANDRO M. DE VILLARD (25 pgs.)
London, England
August 20, 1979

LEONARD F. ALLISTON (9 pgs.)
London, England
August 21, 1979

ALFRED G. COLE (18 pgs.)
London, England
August 21, 1979

JAMES O. EDWARDS (11 pgs.)
London, England
August 21, 1979

SYDNEY ALFRED JOSEPH HILL (30 pgs.)
London, England
August 28, 1979

ROBERT A. HORNE (5 pgs.)
London, England
September 6, 1979

DAVID J. MILTON (10 pgs.)
London, England
July 23, 1979

CLIVE ANSTICE (20 pgs.)
London, England
July 24, 1979

ROBERT H. RAMSEY (35 pgs.)
London, England
July 30, 1979

COLIN JOHN CHARLES MARTIN (25 pgs.)
London, England
September 6, 1979

BRIAN W. WOOD (11 pgs.)
London, England
September 6, 1979

REGINALD A. HEARD (33 pgs.)
London, England
August 28, 1979

RICHARD J. BISSONNETTE (13 pgs.)
London, England
August 30, 1979

ALFRED PARMLEY (27 pgs.)
London, England
August 30, 1979

BERNARD MICHAEL STRICKLAND MAUDUIT (40 pgs.)
London, England
September 4, 1979

MAURICE J. MOGHRABI (69 pgs.)
New York, New York
October 18, 1979

JOHN UNVER New York, New York
October 25, 1979

PLAINTIFF'S EXHIBIT 9

J (A) FORM COPY AV 73 17500 23000
No. 73.IW.1064

THE INSTITUTE OF LONDON UNDERWRITERS.

COMPANIES COMBINED POLICY.

WHEREAS the Assured named in the Schedule herein has promised to pay forthwith a Premium at the Rate specified in the Schedule to Us, The Assurers.

NOW WE THE COMPANIES hereby agree to insure against loss, damage or liability to the extent and in the manner hereinafter provided.

NOW KNOW YE that we the Assurers do hereby bind ourselves, each COMPANY for itself only and not one for another and in respect only of the due proportion of each Company, to pay to the Assured or the Assured's Executors or Administrators all such loss, damage or liability as herein provided that the Assured may sustain during the stated period, not exceeding in all the sum insured, as properly apportioned to the sums, or to the percentages or proportions of the sum insured, subscribed against our names respectively. If the Assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise, this Policy shall become void and all claim thereunder shall be forfeited.

IN WITNESS whereof we the said Assumers have subscribed our names and sums assured in London as hereinafter appears, and the Manager and Secretary of The Institute of London Underwriters has subscribed his name on behalf of each of us.

Signed (ILLEGIBLE)
Manager and Secretary
The Institute of London
Underwriters

SCHEDULE

The Policy No. 73Z W1084

POLICIES LLN Ref. No. A73 17599 28 12 75

Amount, Percentage or Proportion	*Company*	*Reference*
36,1100000	The British Aviation Insurance Co. Ltd.	73337O
8,3300000	Phoenix Assurance Co Ltd. Avn A/C	G3042214448
2,7800000	Continental Insurance Company Avn A/C	K30422144H8
5,5600000	Insurance Corpn of Ireland Ltd Avn A/C	P1153C22
52.7800000 T	Total (T) or Forward (F)	

DATED in London, the 10th December, 1973.

SCHEDULE

The Policy No. 732W 1084

The Name and Address of the Assured: As Per herein stated

The Rate or Premium: U.S. $ 1,361.72

The Period of Insurance

From: 23rd October, 1973 To: 22nd October, 1974.

Both days inclusive, and for such further period or periods as may be mutually agreed upon.

The Risk and Sum Insured hereunder: Fifty two point seven eight per cent part of one hundred per cent of the amounts hereinstated.

AS ATTACHED.

DATED in London, the 10th December, 1973.

AIRCRAFT POLICY

(A.I.O.A.)

WHEREAS the Assured named in the Schedule hereto has US (hereinafter called the insurers) the premium herein stated for the Assurance of the risks hereinafter specified during the period as stated in the Schedule hereto.

NOW THIS POLICY WITNESSETH AND it is hereby agreed as follows

SECTION 1 -LOSS OR DAMAGE TO AIRCRAFT

* * * *

GENERAL EXCLUSIONS

* * * *

WARRANTIES

* * * *

GENERAL CONDITIONS

* * * *

DEFINITIONS

* * * *

SALVAGE SERVICES

* * * *

[Text omitted above and on page is not printed because of illegibility on copy supplied by cross-respondent, and better copy was not furnished. Contents are irrelevant to issue before the Court]

THE SCHEDULE.

	As per addendum attached	ADDRESS:
TYPE OF INSURANCE:	12 months at 23rd October, 1973.	PURPOSES
GEOGRAPHICAL LIMITS:	Continent of Africa west of 0° (excluding Port Guinea) and Western Europe areas other than the foregoing held covered.	FOR WHICH AIRCRAFT USED: Industrial Aid
		PREMIUM:
		US $2,580.00

PARTICULARS OF AIRCRAFT

AIRBRAKE		*ENGINE(S)*		
Make, Type, and Series Number.	*Year of Construction.*	*Declared Passenger Seating Capacity for the Purpose of this Insurance.*	*Identification Marks*	*Number & Type*
	1970	As per Certificate of Airworthiness	3X-OAV	—

MAXIMUM AMOUNT PAYABLE BEFORE THE DEDUCTION OF ANY EXCESS

RISKS	(a) *In respect of any one passenger*	(b) *In respect of any one accident or series of accident arising out of one event.*	(c) *In all under the Policy*
SECTION I		—	—
		—	—
		—	—

VALUES

Aircraft with Standard Instruments & Equipment	*Details of Extra Equipment and Accessories*	*Agreed Value*
		U.S.$120,000.00

VALUE

Excess to be borne by the Assured in respect of each claim

5% of Agreed Aircraft Value US$ 250.00.

WAR, HI-JACKING AND OTHER PERILS EXCLUSION CLAUSE

* * * *

SERVICE OF SUIT CLAUSE (U.S.A.)

[text appears at page 134a]

ADDENDUM

Attaching to and forming part of Policy No. 73.ZW.1084

1. It is understood and agreed that the name of the assured is: Office D'Amenagement De Boke and/or Halco (Mining) Inc. and/or Association Momentanee Impresa Astaldi Estere, Constructions and Enterprises Industrialles, Westminster Dredging Company and/or Compagnie Des Bauxites De Guinee and/or OFAB Construction Co-ordinating Committee for their respective rights and interests.
2. Subject to the renewal of this Policy being offered to the same Underwriters and provided no claim or expense in connection with a claim has been paid or is outstanding hereunder it is agreed to refund to the assured 20% of the Hull premium paid under this Policy by way of No Claim Bonus.
3. Furthermore, pilots covered under this Policy shall be as follows:-

(a) T.G.Walker (11,800 hours, aircraft type rating, aircraft single-engine License, aircraft multi-engine licenee)

(b) M.B. Barry added to policy with effect from 16th November 1973.

(c) Any other pilots approved by the Assured subject to a minimum of Commercial Pilots License 2500 hours 1000 multi-engine, 100 make and model.

J(A)FORM

COPY

In all communications please quote the following reference 509 73ZW 1084

The Institute of London Underwriters Companies Combined Policy.

This Policy is subscribed by Insurance Companies

Members of The Institute of London Underwriters.
40. Lime Street
London. E.C.3
A/C: Office D'Amenagement de Boke et. al.

COPY

No Policy or other Contract dated on or after 1st January, 1924, will be recognized by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or contract as security for their liabilities unless it bears at the foot the Seal of Lloyd's Policy Signing Office.

LLOYD'S POLICY

(Subscribed only by Underwriting Members of Lloyd's all of whom have complied with the requirements of the Insurance Companies Act, 1958, as to security and otherwise.)

Any person not an Underwriting Member of Lloyd's —this Policy or any person —the same if so subscribed will be —to be proceeded against under Lloyd's acts.

WHEREAS the Assured named in the Schedule herein has paid the premium specified in the Schedule to the Underwriting Members of Lloyd's who have hereunto subscribed their Names (hereinafter called "the Underwriters").

NOW WE THE UNDERWRITERS hereby agree to insure against loss, damage or liability to the extent and in the manner hereinafter provided.

If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void and all claim hereunder shall be forfeited.

NOW KNOW YE THAT We the Underwriters, Members of the Syndicates whose definitive numbers in the after-mentioned List of Underwriting Members of Lloyd's are set out in the attached Table hereby bind ourselves each for his own part and not one for another, our Heirs, Executors and Administrators and in respect of his due proportion only, to pay or make good to the Assured or to the Assured's Executors or Administrators or to indemnify him or them against all such loss, damage or liability as herein provided, after such loss, damage or liability is proved and the due proportion for which each of us, the Underwriters, is liable shall be ascertained by reference to his share, as shown in the said List, of the Amount, Percentage or Proportion of the total sum insured hereunder which is in the Table set opposite the definitive number of the Syndicate of which such Underwriter is a Member AND FURTHER THAT the List of Underwriting Members of Lloyd's referred to above shows their respective Syndicates and Shares therein, is deemed to be incorporated in and to form part of this Policy, bears the number specified in the attached Table and is available for inspection at Lloyd's Policy Signing Office by the Assured or his or their representatives and a true copy of the material parts of the said List certified by the General Manager of Lloyd's Policy Signing Office will be furnished to the Assured on application.

IN WITNESS whereof the General Manager of Lloyd's Policy Signing Office has subscribed his name on behalf of each of us.

LLOYD'S POLICY
SIGNING OFFICE

THOS. ELLINGTON
General Manager

SCHEDULE

The Policy No. 509 73ZW1084

The name and address of the Assured As Per hereinstated

The Premium U.S.$ 1,212.28

The Period of Insurance from 23rd October, 1973 to 22nd October, 1974, both days inclusive, and for such further period or periods as may be mutually agreed upon

The risk and sum insured hereunder

Lloyd's Open Market Lines

Lloyd's Open Market Lines being far 16.66 per cent insure their pro rata proportion of the risks expressed herein and the percentages signed in the table are percentages of the amounts of insurance granted in the policy.

Lloyd's Contract No. C.46925 Lines

Lloyd's Contract No. C.46925 lines being percentages part of 100% (of 30.56?) insures their pro rata proportion of the risks expressed herein and the percentage signed in the table are percentages part of 100% (30.56?) of the amounts of the insurance granted in the policy.

DATED in London, the 10th December, 1973.

Definitive Numbers of Syndicates and Amount, Percentage or Proportion of the Total Sum Insured hereunder shared between the Members of those Syndicates.

Amount

L.P. 50 No & CATE

509 62801.1 1/2/74 1
? Underwriter's Ref.

Percent
7.50 48 01J11J2J20
.83 140 0122200
8.33 824 12969

The List of Underwriting Members of Lloyds is Numbered 197472

---

total line
3 16.66

	509	46925/ / /
Per Cent	SYNDICATE	UNDERWRITER'S Ref.
17.42	295	3A744C112146
9.76	899	9629Y-X94434x
4.13	896	96236X94434x
6.97	560	1025L35013
6.53	48	XXXXXXXX167N
2.13	140	XXXXXXXX167N
8.71	33	85486381
10.45	173	136XX2773
8.71	511	X30003593J
2.69	950	4575002567G
3.43	619	331LA1003093
3.43	790	7044600000
2.69	445	556053904067
2.79	103	9227L31273
3.48	334	801COAcc1052
1.75	496	1440
1.05	30	LGT2343X42
3.45	581	COLSXX3G73
Amount (illegible)	(illegible)	(illegible)
	509	46925/ / 2 /
	SYNDICATE	UNDERWRITER'S Ref.
	275	50C5333
1.40	19	100.00

[The material appearing at pages 515a-519a was here repeated]

FORM J(A) (illegible)

LLOYD'S (Seal) LONDON

COPY

LLOYD'S POLICY73 ZW1084

The Assured is requested to read this Policy and, if it is incorrect, return immediately for alteration.

In all communications please quote the Policy Number appearing in the Schedule overleaf.

In the event of any occurrence likely to result in a claim under this Policy, immediate notice should be given to:—

C.T. BOWRING & CO INSURANCE CO.

DEFENDANTS' EXHIBIT C
EXCESS INSURER DEFENDANTS

Defendant	*Country of Incorporation*	*Licensed in PA*
The Insurance Corporation of Ireland Ltd.	Ireland	No
Eagle Star Insurance Co. Ltd.	England	Yes until 1978
Hanover Insurance Company	New Hampshire, U.S.A.	Yes
Continental Assurance Company of London Ltd.	England	No
The Century Insurance Co. Ltd.	Scotland	No
Yuval, The Insurance Company of Israel Ltd.	Israel	No
Home Insurance Company (doing business in England as Home Insurance Co. Ltd.)	New Hampshire, U.S.A.	Yes
Slater Walker Insurance Co. Ltd.	England	No
Yasuda Fire & Marine Insurance Co. (UK) Ltd.	England	No
Nichido Fire & Marine Insurance Co. Ltd.	Japan	No
Turegum Insurance Company	Switzerland	Surplus lines only

Defendant	*Country of Incorporation*	*Licensed in PA*
Sahar Insurance Co. Ltd.	Israel	No
Excess Insurance Co. Ltd.	England	Surplus lines only
Trident Insurance Co. Ltd.	England	No
Vesta (UK) Ltd.	England	No
Chiyoda Fire & Marine Insurance Co. Ltd., Tokyo	Japan	No
Stronghold Insurance Co. Ltd.	England	No
British Reserve Insurance Co. Ltd.	England	No
English & American Insurance Co. Ltd.	England	Surplus lines only
Consolidated European Reinsurance Co. Ltd.	England	No
L'Union Atlantique S.A. d'Assurances, Brussels	Belgium	No
Mercantile & General Reinsurance Co. Ltd.	England	No

DEFENDANTS' EXHIBIT I (JG-1)

TYPE	*ALL RISKS PHYSICAL LOSS OR DAMAGE as original*
FORM	As underlying as far as applicable
ASSD/	*COMPAGNIE DES BAUXITES DE GUINEE (C B.G) &/or*
REASSD.	*OFFICE D'AMENAGEMNT DE LA REGION DE BOKE (O.F.A.B.)* or as original
PERIOD	Continuous at 12 February 1974 subject three months' notice of cancellation received prior anniversary
INT.	BUSINESS INTERRUPTION (6 months Period of Indemnity)
S.I.	U.S. $10,000,000 each and every loss Excess of U.S. $10,000,000 each and every loss
SIT	Guinea as original
CONDS.	Agree if required sign as R/I of local company to be advised to leading underwriter Full R/I Clause (ex retention) New Equivalent Clause Agree waive advice of alteration in total values where loss limits remain unaltered
PREM.	O.G.R.
BKGE.	32½% and tax if any
INF.	Annual Profit estimated U.S. $40,000,000 O.G.R. 0.8% on annual profits Primary policy contains deductible 7 days and 28 working days applicable to wharf area as more fully described in original policy

WRITTEN % ORDER ORDER CLOSED FOR
LINES Part OF WHOLE

LEADING UNDERWRITERS AGREEMENT (N.M.A.) OFF SLIPS AND/OR ANNUAL RE-SIGNINGS OF TERM POLICIES TO BE INITIALLED LEADING LLOYD'S NON-MARINE UNDERWRITER ONLY INCREASES UP TO 10% OF WRITTEN LINES SUBJECT TO AGREEMENT AND INITIALMENTS BY TWO UNDERWRITERS ONLY

COMPANIES HEREON AGREE TO COMPLY WITH THE ABOVE.

P.T. (N.M.A.)

AGREED ISSUE REINSURANCE SLIP POLICY (N.M.A.) IF REQUIRED

AGREED SIGN RENEWAL RECEIPT IF REQUIRED WITHOUT PRODUCTTION OF EXPIRING SLIP OR POLICY

AGREED EXTEND FOR UP TO ONE CALENDAR MONTH ON AGREEMENT ONLY.

SUBJECT OTHERWISE TO CCSA 1960 COMPANIES AGREE AUTHORISATION FORMS NOT REQUIRED BUT CLOSING INSTRUCTIONS AND ADDENDA WILL BE SENT WITH A FORM FOR RETURN WITHIN 14 DAYS IF NECESSARY SHOWING ANY OBJECTION

DEFENDANTS' EXHIBIT JG2

Underwriters' acceptance stamps, will be lodged separately

DEFENDANTS' EXHIBIT JG2A

$10,000,000 EXCESS BUSINESS INTERRUPTION INSURANCE FOR CBG EFFECTIVE FEBRUARY 12, 1974

Insurer	*Date Signed*	*% accepted*	*final %*
Ins. Corp. Ireland	Jan. 31	60*	47.9616
Merc. & Gen.	Feb. 13	10	7.9936
Eagle Star	Feb. 14	6	4.7962
Hanover	Feb. 14	6	4.7962
Continental	Feb. 25	4	3.1974
Century	Feb. 13	5	3.9968
Yuval	Feb. 13	5	3.9968
Home	Feb. 15	4	3.1974
Slater-Walker	Feb. 18	3	2.3981
Yasuda	Feb. 15	2	1.5987
Nichido	Feb. 15	.5	.3997
Turegum	Feb. 20	1.25	.9992
Sahar	Feb. 27	1.5	1.1990
Excess	Feb. 18	2	1.5987
Trident	Feb. 14	1	.7994
Vesta	Feb. 14	.25	.1998
Chiyoda	Feb. 14	.25	.1998
Stronghold	Feb. 4	1	.7994
British Reserve	Feb. 26	1	.7994
Eng. & Am.	Feb. 27	.6	.4796
Consolidated Eur.	Feb. 27	.75	.5995
L'Union Atlantique	Feb. 22	10	7.9936
		125.1%	100.00%

* originally 10%, amended to 60%

DEFENDANTS' EXHIBIT F1

OFFER OF PROOF OF
BRITISH RESERVE INSURANCE CO. LTD.

1. BRITISH RESERVE INSURANCE CO. LTD. hereinafter designated "the Company," is a corporation organized under the laws of Great Britain, having its head office at Tunbridge Wells and its principal underwriting office for the transaction of business on the London insurance market at 37/39 Lime Street in the City of London, England.

2. At the time it accepted a share of the business interruption coverage for the Compagnie des Bauxites de Guinee and at the time of the loss the Company was principally engaged in writing insurance in the London market covering risks in the United Kingdom and in other parts of the world, but excluding the United States and Canada.

3. Insurance risks are customarily received and accepted by the Company and its said underwriting office in London in the following manner.

A representative of one of the insurance brokerage houses in London, who is commonly called the broker, calls, uninvited, at the Company's said underwriting office and speaks to one of the Company's representatives in its underwriting department, who is commonly called an underwriter, and shows him a document known as a placing slip which summarizes the material facts relating to the risk for which the broker desires insurance coverage. The underwriter, if he decides to accept the risk, places his initial and the Company's stamp on the broker's placing slip, indicating the percentage of the total amount to be covered by insurance in which the Company agrees to participate and makes a copy of the placing slip for the Company's files, returning the original to the broker.

4. In the transaction described in paragraph 3 above the broker has acted as agent for the insured, who originated the transaction by asking the broker to place the desired insurance.

On some occasions the insured goes first to an originating broker outside the London market, and the latter, acting on behalf of the insured, requests the London broker to obtain the insurance coverage desired by the insured, and the existence and identity of the originating broker may or may not be disclosed by the London broker to the underwriter.

5. The excess business interruption insurance involved in the present case was placed in the customary manner described in paragraph 3 and 4 above. A representative of Bland Welch (International) Ltd., a London insurance brokerage house, called on Monneret de Villard, one of the Company's underwriters, and offered him a share of $10,000,000 excess business interruption insurance insuring possible loss of profits from the interruption of the bauxite mining operations of the insured, the Compagnie des Bauxites de Guinee, at Kamsar, in the Republic of Guinea, Africa, which might arise from an accident to the insured equipment there covered by property damage insurance issued by another carrier. The broker represented this coverage, not as direct insurance running to the insured, but as reinsurance of a risk insured directly by a local Guineen insurance company. The information which the broker gave to the underwriter contained no indication that the property involved or the insured had any connection with the United States or that in the event of a claim the Company would be subject to suit in one of the States of the

United States of America. The Company agreed to accept a one percent share of the insurance, signed the placing slip tendered by the broker to this effect, made a copy of it for its file and returned the original to the broker.

6. At the time the risk was accepted and at the time of the loss the Company was not licensed to write insurance for insureds in Pennsylvania or anywhere else in the United States, nor covering risks situated in Pennsylvania or elsewhere in the United States.

7. From the information received from brokers with whom the Company has dealt and from the recollections of individuals in the Company's employ who are familiar with its business, the Company states that the business done by it involving the Commonwealth of Pennsylvania by reason of the location there of risks from which the Company has received premium income was as set forth on Schedule A hereto attached and made part hereof. The Company offers to support the foregoing offer, including the statistics set forth in Exhibit A, by records from its files demonstrating the same, and it has offered to make all its underwriting records available to plaintiff for inspection and copying.

BRITISH RESERVE INS. COMPANY

1 *Year*	2 *Total number known of risks insured by the Company*	3 *Number of known risks involving Pennsylvania*
1973	4708	1
1974	9216	8
1975	7580	20
1976	5811	32
1977	4969	45
1978	5319	39

The number quoted in column (2) does not include the U.K. or Treaty department, if these are included it would increase the figures by at least 100,000 owing to the "scheme" run by the U.K. department.

A rough approximation would be :—

1973 — 1978	137603	145

4 % of known risks involving Pennsylvania	5 Total premium income of the Company	6 Known premium income from Pennsylvania Business	7 % of premium income from known Pennsylvania Business	
0.02124	L13,783,497	$ 253.50	0.0034	R.O.E.
				2.00
0.08681	L 6,346,834	$19798.83	0.0016	
0.26385	L10,022,786	$25384.48	2.0013	
0.55068	L11,991,589	$18155.34	0.0008	
0.90561	L12,233,100	$18869.33	0.0008	
0.7332	L12,563,003	$19239.81	0.0008	

A rough approximation would be :—

0.00105	L56,940,809	$101701.29	0.0089

Marine Department

1 *Year*	2 *Total number of risks issued by the Department*	3 *Number of risks involving Pennsylvania*
73	646	NONE KNOWN
74	665	"
75	775	"
76	725	"
77	648	"
78	694	"

Marine Department

Year	4 *% of risks involving Pennsylvania*	5 *Total premium income of the Company*	6 *Premium income from Pennsylvania Business*	7 *% of premium income from Pennsylvania Business*
73	NIL*	340395	NIL*	NIL*
74	"	415797	"	"
75	"	669105	"	"
76	"	889254	"	"
77	"	717445	"	"
78	"	521912	"	"

*The Marine Department does not have any separate filing system regarding situations but as far as can be seen from records available there are no risks involving Pennsylvania.

Please see memo attached from Marine Underwriter.

Aviation Department

1 *Year*	2 *Total number of policies written by the Department*	3 *Number of risks involving Pennsylvania*
73	1894	Not Known*
74	3215	"
75	2708	"
76	2222	"
77	1991	"
78	2854	"

*The Aviation Department only keeps records of situations relating to continents i.e. North America, South America, Africa. The risk situation is disclosed in the penultimate digit of the reference i.e. 76VO4976INI9 being North America.

The number quoted in column (2) is the number of policies written but one or more risks may attach to each policy.

Please see memo attached from Aviation Underwriter.

Aviation Department

Year	4 *Year of risks involving Pennsylvania*	5 *Premium income of the Department*	6 *Premium income from Pennsylvania Business*	7 *% of premium income from Pennsylvania Business*
73	Not Known*	L1446363	Not Known*	Not Known*
74	"	L1345420	"	"
75	"	L1613293	"	"
76	"	L2108391	"	"
77	"	L1599129	"	"
78	"	L1744996	"	"

*The Aviation Department only keeps records of situations relating to continents i.e. North America, South America, Africa. The risk situation is disclosed in the penultimate digit of the reference i.e. 76VO4976INI9 being North America.

Home Foreign Department

1 Year	2 Total number of policies written by the department	3 Number of risks involving Pennsylvania	4 % of risks involving Pennsylvania
1973	2168	1	0.0461
1974	5336	8	0.1499
1975	4097	20	0.4881
1976	2864	32	1.11731
1977	2330	45	1.9313
1978	1771	39	2.2021

a) Up to 1975 renewals were given new numbers after that date, renewals were given the same number as the original policy.

b) The number quoted in column (2) is the number of the new policies written in the Home Foreign Department each may contain one or more risks.

c) The Home Foreign Department keeps street cards in order that policies may be traced regarding situations.

d) The C.B.G. card is filed under Africa.

Home Foreign Department

5 Total premium income of the Department	6 Premium income from Pennsylvania Business	7 % of premium income from Pennsylvania Business
L 310,260	U.S.$253.50	0.0477 R.O.E. 2.00
L1,345,420	U.S.$19798.83	0.07358
L4,926,730	U.S.$25384.48	0.25762
L5,328,115	U.S.$18155.34	0.17039
L5,970,274	U.S.$18869.33	0.15803
L5,833,966	U.S.$19239.81	0.16489

U.K. Department

1 *Year*	2 *Total number of policies issued by the department*	3 *Number of risks involving Pennsylvania*
1.1.78		
—	1364	Nil
1.6.78		
—	2337	Nil
1.6.78 YE		
—		
1.6.78		

a) No records are available before 1.1.78 regarding the number of risks written as there is no reason to keep records longer than a couple of years.

b) But a rough approximation is that between 2,500 and 3,000 "risks" are written each year.

c) The word "risks" in (b) does not include items such as "scheme" these are projects where a television or deep freeze obtained from the Thorn Electrical Group is insured with us. This and similar "schemes" make up approximatly another 100,000 risks.

U.K. Department

Year	4 % of risks involving Pennsylvania	5 Total premium Total premium income of the Department	6 Premium income from Pennsylvania Business	7 % of premium income from Pennsylvania Business
1.1.78 — 1.6.78	Nil	Premium received from 1.1.78 to 31.12.78	Nil	Nil
1.6.78 YE — 1.6.78	Nil	12,860,591	Nil	Nil

Treaty Department

1 *Year*	2 *Total number of treaties issued by the Department*	3 *Number of risks involving Pennsylvania*
1973 — 1978	113	Not Known

The treaty department does not write treaties which are solely U.S.A. but some of the treaties are worldwide and therefore may contain business emulating from the United States but the department is not informed as to how many or which risks attach to each treaty.

Treaty Department

4 *% of risks involving Pennsylvania*	5 *Total premium income of the department*	6 *Premium income from Pennsylvania business*	7 *% of premium income from Pennsylvania business*
Not Known	L6727957	Not Known	Not Known

PREMIUM PER DEPARTMENT

73	
MARINE.	340395
AVIATION.	1446363
LONDON MARKET.	310260
U.K. DIRECT	912839
TREATY IN INC. U.K. & OVERSEAS	773640
	3783497

74	
MARINE	415797
AVIATION	1345420
LONDON MARKET	2011123
U.K. DIRECT	1561416
TREATY IN INC. U.K. & OVERSEAS	1013078
	6346834

75	
MARINE	669105
AVIATION	1613293
LONDON MARKET	4926730
U.K. DIRECT	1801593
TREATY IN THE U.K. & OVERSEAS	1012065
	10022786

76	
MARINE.	899254
AVIATION.	2108391
LONDON MARKET.	5328115
U.K. DIRECT	2404715
TREATY IN INC. U.K. & OVERSEAS	1251114
	11991589

77	
MARINE.	717445
AVIATION.	1599129
LONDON MARKET	5970274
U.K. DIRECT	2514128
TREATY IN INC. U.K. & OVERSEAS	1432124
	12233100

78	
MARINE	521912
AVIATION	1744996
LONDON MARKET	5833966
U.K. DIRECT	3216193
TREATY IN INC. U.K. & OVERSEAS	1245936
	12563003

DEFENDANTS' EXHIBIT F2

OFFER OF PROOF OF THE CONTINENTAL ASSURANCE COMPANY OF LONDON, LTD.

1. THE CONTINENTAL ASSURANCE COMPANY OF LONDON, LTD. hereinafter designated "the Company," is a corporation organized under the laws of Great Britain, having its head office at Fountain House, Fenchurch Street, London EC3 and its principal underwriting office for the transaction of business in the London insurance market at Fountain House, Fenchurch Street, in the city of London.

2. At the time it accepted a share of the business interruption coverage for the Compagnie des Bauxites de Guinee and at the time of the loss the Company was principally engaged in writing insurance on the London market covering risks in the United Kingdom and in other parts of the world, but excluding the United States.

3. Insurance risks are customarily received and accepted by the Company and its said underwriting office in London in the following manner.

A representative of one of the insurance brokerage houses in London, who is commonly called the broker, calls, uninvited, at the Company's said underwriting office and speaks to one of the Company's representatives in its underwriting department, who is commonly called an underwriter, and shows him a document known as a placing slip which summarizes the material facts relating to the risk for which the broker desires insurance coverage. The underwriter, if he decides to accept the risk, places his initial and the Company's stamp on the broker's placing slip, indicating the percentage of the total amount to be covered by insurance in which the Company agrees to participate and makes a copy of the placing slip for the Company's files, returning the original to the broker.

4. In the transaction described in paragraph 3 above the broker has acted as agent for the insured, who originated the transaction by asking the broker to place the desired insurance.

On some occasions the insured goes first to an originating broker outside the London market, and the latter, acting on behalf of the insured, requests the London broker to obtain the insurance coverage desired by the insured, and the existence and identity of the originating broker may or may not be disclosed by the London broker to the underwriter.

5. The excess business interruption insurance involved in the present case was placed in the customary manner described in paragraph 3 and 4 above. A representative of Bland Welch (International) Ltd., a London insurance brokerage house, called on John Morris Humm, one of the Company's underwriters, and offered him a share of $10,000,000 excess business interruption insurance insuring possible loss of profits from the interruption of the bauxite mining operations of the insured, the Compagnie des Bauxites de Guinee, at Kamsar, in the Republic of Guinea, Africa, which might arise from an accident to the insured equipment there covered by property damage insurance issued by another carrier. The broker represented this coverage, not as direct insurance running to the insured, but as reinsurance of a risk insured directly by a local Guineen insurance company. The information which the broker gave to the underwriter contained no indication that the property involved or the insured had any connection with the United States or that in the event of a claim the Com-

pany would be subject to suit in one of the States of the United States of America. The Company agreed to accept a four percent share of the insurance, signed the placing slip tendered by the broker to this effect, made a copy of it for its file and returned the original to the broker.

6. At the time the risk was accepted and at the time of the loss the Company was not licensed to write insurance for insureds in Pennsylvania or anywhere else in the United States, nor covering risks situated in Pennsylvania or elsewhere in the United States. The only occasions on which the Company has insured risks relating to property in Pennsylvania has been where the Company has participated in coverage relating to various items of property of an insured doing business throughout the world, a few subsidiary locations of which were in Pennsylvania.

7. From researches done in the Company's files, it is possible to say that for the period 1973 to 1978 there were approximately 40,000 individual cases written of which a number are treaties, covers, lineslips, and therefore the actual number of risks written is considerably in excess of that figure. No business as such is written on a direct basis in Pennsylvania, although there is a possibility that risks on a subsidiary location basis (incidental) are written in Pennsylvania, but the percentage is probably very small and undoubtedly less than 0.1%, which represents a minute proportion of the total business written by this Company.

DEFENDANTS' EXHIBIT F3

OFFER OF PROOF OF TRIDENT INSURANCE CO. LTD.

1. TRIDENT INSURANCE CO. LTD. hereinafter designated "the Company," is a corporation organized under the laws of Great Britain, having its head office at Trident House, Russell Street, Gloucester, and an underwriting office at 37/39 Lime Street, in the City of London.

2. At the time it accepted a share of the business interruption coverage for the Compagnie des Bauxites de Guinee and at the time of the loss the Company was principally engaged in writing insurance in the London market covering risks in the United Kingdom and in other parts of the world.

3. Insurance risks are customarily received and accepted by the Company and its said underwriting office in London in the following manner.

A representative of one of the insurance brokerage houses in London, who is commonly called the broker, calls, uninvited, at the Company's said underwriting office and speaks to one of the Company's representatives in its underwriting department, who is commonly called an underwriter, and shows him a document known as a placing slip which summarizes the material facts relating to the risk for which the broker desires insurance coverage. The underwriter, if he decides to accept the risk, places his initial and the Company's stamp on the broker's placing slip, indicating the percentage of the total amount to be covered by insurance in which the Company agrees to participate and makes a copy of the placing slip for the Company's files, returning the original to the broker.

4. In the transaction described in paragraph 3 above the broker has acted as agent for the insured, who originated the transaction by asking the broker to place the desired insurance.

On some occasions the insured goes first to an originating broker outside the London market, and the latter, acting on behalf of the insured, requests the London broker to obtain the insurance coverage desired by the insured, and the existence and identity of the originating broker may or may not be disclosed by the London broker to the underwriter.

5. The excess business interruption insurance involed in the present case was placed in the customary manner described in paragraph 3 and 4 above. A representative ef Bland Welch (International) Ltd., a London Insurance brokerage house, called on Sidney Hill, one of the Company's underwriters, and offered him a share of $10,000,000 excess business interruption insurance insuring possible loss of profits from the interruption of the bauxite mining operations of the insured, the Compagnie des Bauxites de Guinee, at Kamsar, in the Republic of Guinea, Africa, which might arise from an accident to the insured equipment there covered by property damage insurance issued by another carrier. The broker represented this coverage, not as direct insurance running to the insured, but as reinsurance of a risk insured directly by a local Guineen insurance company. The information which the broker gave to the underwriter contained no indication that the property involved or the insured had any connection with the United States or that in the event of a claim the Company would be subject to suit in one of the States of the United States of America. The Company agreed to accept a one percent share of the insurance, signed the placing slip tendered

by the broker to this effect, made a copy of it for its file and returned the original to the broker.

6. At the time the risk was accepted and at the time of the loss the Company was not licensed to write insurance for insureds in Pennsylvania or anywhere else in the United States, nor covering risks situated in Pennsylvania or elsewhere in the United States.

7. From the information received from brokers with whom the Company has dealt and from the recollections of individuals in the Company's employ who are familiar with its business, the Company states that the business done by it in its fire and accident departments involving the Commonwealth of Pennsylvania by reason of the location there of risks from which the Company has received premium income was as set forth on schedule A hereto attached and made part hereof. The Company offers to support the foregoing offer, including the statistics set forth in Exhibit A, by records from its files demonstrating the same, and it has offered to make all its underwriting records available to plaintiff for inspection and copying, including those of its marine and aviation department.

(1) *Year*	(2) *Total number of risks issued by the Company*	(3) *Number of Risks involving Pennsylvania*	(4) *% of risks involving Pennsylvania*
1974	7824	1	0.012
1975	7334	1	0.013
1976	7997	9	0.25
1977	8094	25	0.309
1978	7165	4	0.055

Year	(5) *Total premium income of the Company £ Sterling*	(6) *Premium income from Pennsylvania business U.S. Dollars*	(7) *% of premium income from Pennsylvania business*
1974	8,879,000	170	See note Always less than 0.1%
1975	10,758,500	412	
1976	12,729,166	2,488	
1977	17,236,580	7,723	
1978	20,940,000	1,773	

NOTES 1) Column 7 depends on rate of exchange used to convert Dollars to Sterling and is therefore not meaningful.

2) Figures are for calendar year calculated prorata. Trident financial year does not coincide with calendar year.

3) Number of risks is new contracts per year. Total premium includes renewed contracts.

4) Treaty & Marine & Aviation business is totally excluded from these figures.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-440

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THE INSURANCE CORPORATION OF
IRELAND, LTD, et al.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Cloyd R. Mellott (Counsel of Record)
Dale Hershey
Robert W. Doty
Jordan S. Weltman
Eckert, Seamans, Cherin & Mellott
42nd Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
412-566-6000

Counsel for Cross-respondent

TABLE OF CONTENTS

Page

Answer to Cross-Petitioners' Statement of the Case 1

Answer to Cross-Petitioners' Argument 3

Conclusion 22

TABLE OF AUTHORITIES

Cases Page

Antico v. Honda of Camden, 85 F.R.D. 34 (E.D. Pa. 1979) 16

Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971) 11

Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969) 19

David v. Hooker, 560 F.2d 412 (9th Cir. 1977) 10

Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) 11

English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), cert. denied, 444 U.S. 832 (1979) . . . 14

Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) 10

TABLE OF AUTHORITIES
(continued)

Cases Page

Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975) 11

General Motors v. New York, 501 F.2d 639 (2d Cir. 1974) . . . 21

G - K Properties v. Redevelopment Agency, 577 F.2d 645 (9th Cir. 1978) 16

Hunter v. International Systems & Controls Corp., 56 F.R.D. 617 (W.D. Mo. 1972) 11

In re Anthracite Coal Antitrust Litigation, 82 F.R.D. 364 (M.D. Pa. 1979) 12

Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976) 8

Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.), vacated on other grounds, 442 U.S. 915 (1979) 20, 21

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 16, 17

Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978) 15, 16

TABLE OF AUTHORITIES
(continued)

Treatises Page

Moore's Federal Practice 11, 19

Wright & Miller, Federal Practice and Procedure 12

ANSWER TO CROSS-PETITIONERS' STATEMENT OF THE CASE

The cross-petitioners, in their statement of the case and throughout the cross-petition, repeatedly assert, wrongly, that the district court entered a sanction against them for their failure to produce in Pittsburgh voluminous files which they had offered to produce in London. Such was not the case. The issue before the district court was never _where_ documents would be produced, but rather _whether_ the cross-petitioners would produce information at all. The district court repeatedly ordered the cross-petitioners to produce; they promised to do so; they sought extensions of time to do so; they were warned that failure to do so would result in a sanction; nevertheless, their attempts to gather the information were belated and half-hearted; they did not start to collect documents until almost six months after they were ordered to produce them; what they eventually produced was woefully inadequate; and the district court, exasperated by their non-production, properly entered its sanction.

The cross-petitioners' statement of the case also asserts wrongly that, outside of the sanction, no evidence exists to support jurisdiction over the cross-petitioners. The statement goes so far as to say that the court of appeals was "in accord" with this assertion (Cross-petition "C-P" at p. 6). To the contrary, the court of appeals, because it upheld the imposition of the sanction, expressly determined to pretermit the issue of whether the cross-petitioners did business in Pennsylvania sufficient to subject them to in personam jurisdiction there. However, the court noted evidence in the record that the cross-petitioners did indeed do business in Pennsylvania. 651 F.2d at 886n.9. The cross-petitioners' averments in the statement of the case (C-P at 4) and elsewhere (C-P at 7, 24) that they do no business in Pennsylvania also are flatly contradicted by the findings of the district court. See Appendices to C-P at 47a-48a, 75a.

ANSWER TO CROSS-PETITIONERS' ARGUMENT

The cross-petitioners' argument primarily revolves around its allegation of "the practical impossibility of bringing four million files from London to Pittsburgh" (C-P at 13), so that "[d]efendants were entitled to produce their files in London" (C-P at 12). This argument miscategorizes the basis for the district court's sanction. The place of production was never the issue. Indeed, cross-petitioners admit that the order to produce did not dictate the location for production and that production in Pittsburgh was merely an assumption made by the cross-petitioners (C-P at 12). The true issue was the cross-petitioners' failure, after months of promises, to produce the requested information anywhere, and in the face of that failure the district court's imposition of a sanction determining personal jurisdiction was just and proper.

The plaintiff, already possessing some evidence that the cross-petitioners did business in Pennsylvania, sought discovery of policies or cover notes in which the cross-petitioners insured risks located in Pennsylvania, provided coverage to insureds located in Pennsylvania, or provided the coverage through a Pennsylvania broker.

On July 27, 1981 the cross-petitioners agreed to produce these policies after the district court had limited the time period covered by the request, and cross-petitioners requested 90 days in which to comply, with the opportunity, if necessary, of obtaining an extension. After 90 days the cross-petitioners made no production, but requested an extension of time, representing that they would "probably be able to complete the [production] within 30 days." At the completion of the 30-day extension the cross-petitioners again made no production, but filed an affidavit representing that they would make four million files available at their various home office locations in England, Brussels and Tel Aviv, so that CBG might seek to determine for itself whether any of the files revealed the extent of the cross-petitioners' business in Pennsylvania.

On November 27, 1978 CBG filed a motion to compel production of the insurance policies. At a hearing on December 21, 1978, the district court gave the cross-petitioners 60 more days to produce the documents, and stated that a failure to produce would result in a sanction that the cross-petitioners were subject to the court's jurisdiction.

The cross-petitioners' eventual production was woefully inadequate. Contrary to their sworn statement made in November 1978 that the sought-after documents were to be found somewhere in their scattered four million files, they turned to the centralized files of London brokers, turning the burden of production over to those nonparty brokers. The district court had advised them on July 27, 1978 to send form letters to the brokers. The cross-petitioners, however, waited until January 1979, six months later, to send these letters; they gave the brokers less than one month to gather the documents; they offered the brokers no financial assistance, no staff assistance, and no policy numbers or other support; and, as could be expected, the brokers responded that they could not comply given the lack of time and information.

On April 19, 1979 the district court imposed its sanction that for the purposes of this litigation the cross-petitioners were subject to the in personam jurisdiction of the district court. The issuance of such an order under Rule 37 clearly was within the discretion of the district court. Although the cross-petitioners now argue that they were unable to produce the information requested by the plaintiff concerning the extent of their Pennsylvania business, they had filed previously affidavits asserting, for example, that cross-petitioner Consolidated European Reinsurance Co. Ltd. had insured only 6 risks located in Pennsylvania which represented 0.02% of the gross premium income received in its London office. The cross-petitioners' attempt to avoid proving such assertions through production by offering to open their entire home office files to CBG was insufficient and unacceptable. In Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76-77 (D. Mass. 1976), the defendant offered to finance the travel of the plaintiff's attorney

> so that he may either attempt to locate the desired documents among the defendant's massive files, or else verify for himself the impossibility of such a task. The defendant has in essence told the plaintiff that, if he wishes, he may hunt through all its documents and find the information

> for himself. "This amounts to nothing more than a gigantic 'do it yourself' kit."

The Kozlowski court rejected such an attempt to avoid production, as did the district court in the instant case, and both courts properly exercised their discretion in doing so.

Having miscategorized the factual basis behind the imposition of the sanction, distorting the issue from the true question of their continued unexcused refusal to produce to a debate over where their production would take place, the cross-petitioners commit a fundamental error in their legal analysis on the sanction issue. The cross-petitioners assert repeatedly that "wilfulness was a prerequisite to the imposition of a sanction order" (C-P at 9, 10, 20).

A finding of willfulness emphatically is not a requirement for the type of sanction imposed by the district court. Although a finding of willfulness, bad faith or fault is necessary before the sanctions of dismissal or default judgment may be entered, there is no such requirement before less severe sanctions may be imposed. Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974), cited by the cross-petitioners for the proposition that a failure to determine a party's willfulness constitutes an abuse of discretion, perfectly illustrates this rule.

> The 1970 amendments were intended to authorize the court, where it deemed appropriate, to impose more flexible and softer sanctions for Rule 37 violations than theretofore provided. However, there was no intent to eliminate the willfulness element when the harsh sanction of the dismissal of a complaint or the striking of an answer was ordered.

Id. at 708 (emphasis added). See also David v. Hooker, 560 F.2d 412, 419 (9th

Cir. 1977); Edgar v. Slaughter, 548 F.2d 770, 773 (8th Cir. 1977); Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975); Hunter v. International Systems & Controls Corp., 56 F.R.D. 617, 620 (W.D. Mo. 1972); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569, 583-84 (W.D. Mo. 1971). The commentators are in accord. Professor Moore states that

> the Rogers opinion . . . stated unequivocally that no wilfulness is necessary to bring Rule 37(b) into play, but added that, absent wilfulness, the case may not be dismissed for failure to produce.

4A Moore's Federal Practice ¶ 37.03[2], at 37-62 (2d. ed.). Wright & Miller is to similar effect.

> Any failure to disclose, regardless of the reason for it, brings the sanctions of Rule 37 into play, but the reason for the failure is an important consideration in determining what sanction to impose. If the failure is because of inability to comply, rather than because

> of willfulness, bad faith, or any fault of the party, the action may not be dismissed, nor a default judgment given, and less severe sanctions are the most that can be invoked.

8 Wright & Miller, Federal Practice and Procedure § 2283 at 763.

All of the cases cited in the cross-petition concerned the sanctions of dismissal or default judgment. Their references to a requirement of willfulness, therefore, are inapposite to the case at bar. The cross-petitioners' citation of In re Anthracite Coal Antitrust Litigation, 82 F.R.D. 364, 368 (M.D. Pa. 1979) and their supplied emphasis to the court's use of the word "any" (C-P at 9) is misleading at best and arguably disingenuous in light of the uncontradicted authority that a requirement of willfulness is only implicated when the harsh sanctions of dismissal or default are invoked. As recognized by the court below,

> Here, the sanction was carefully tailored to fit the situation; only the facts necessary to establish the minimum contacts needed to justify personal jurisdiction in this action were taken as established pursuant to the sanction.

651 F.2d at 886.

Even if willfulness were required for the limited sanction entered against the cross-petitioners, the facts found by the district court and relied upon by the court of appeals show a pattern of willful conduct here. From the events one can only conclude that the cross-petitioners deliberately set out to disobey the district court's order to produce. Their offering of irrelevant documents and their half-hearted attempt to get documents from brokers were mere gestures, not good faith compliance with the court's order. Their conduct was willful.

Cross-petitioners argue that English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), cert. denied, 444 U.S. 832 (1979) may not be relied upon as precedent for determining jurisdiction by sanction because there the court also found sufficient minimum contacts to uphold jurisdiction. However, that holding, made in a footnote, 590 F.2d at 728n.6, merely provided an alternative ground for jurisdiction and it was neither relied upon for nor could it vitiate the primary holding of the case that a district court may exercise its discretion to impose a sanction determining personal jurisdiction for the purposes of the litigation. In addition, cross-petitioners' argument overlooks the alternative grounds, including a finding of the requisite minimum contacts, upon which the district court below based its finding of jurisdiction and to which the court of appeals gave credence in its ninth footnote. As in the English case, the courts below have found facts supporting in personam jurisdiction based upon cross-petitioners' extensive contacts with the forum state.

Cross-petitioners appear to argue that they now are willing to produce the requested documents, so that the sanction should be removed (C-P at 12, 19). But, the cross-petitioners' offer is to open their entire home office files to the plaintiff; they have never agreed to produce the information specifically requested by CBG. More important, an offer to produce is insufficient to vacate a sanction. As stated in Ohio v. Arthur

Andersen & Co., 570 F.2d 1370, 1374 (10th Cir.), cert. denied, 439 U.S. 833 (1978),

> Final production is not determinative. The Rule permits a sanction when a party "fails to obey an order. . . ." The ultimate, and reluctant, production of documents, more than a year after a legitimate request, does not absolve Anderson of the charge that it willfully failed to obey a valid court order.

Similarly, the Ninth Circuit in G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978) held that a party's "last-minute tender of relevant documents could not cure the problem they had previously created." Accord, Antico v. Honda of Camden, 85 F.R.D. 34, 36 (E.D. Pa. 1979). This is the only rule which makes sense, for, as stated in the Rule, a sanction issued pursuant to Rule 37(b)(2)(A) establishes facts "for the purposes of the action." As pointed out by this Court in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), sanctions serve a purpose as a deterrent. Even if the cross-petitioners were truly contrite, should the district court's sanction be vacated "other parties to other lawsuits would feel freer . . . to flout other discovery orders of other district courts." Id. at 643. Cross-petitioners here were warned that continued flouting of the district court's order would result in a sanction; they chose to put the district court to the test, and should not be heard to complain because the court carried out its word.

The cross-petition is filed on the grounds that the sanction should not have been imposed. National Hockey League, supra, made it clear that the question

> is not whether this Court, or whether any Court of Appeals, would as an original matter have

> dismissed the action, it is whether the District Court abused its discretion in so doing.

427 U.S. at 642. In the instant case the district court entered a limited sanction, far short of a default judgment, and the court of appeals has given its approval. The cross-petitioners seek this Court's review of the factual basis for the sanction; such is not a proper basis on which to grant certiorari.

ANSWER TO CROSS-PETITIONERS' ARGUMENT ON FORUM NON CONVENIENS

The Third Circuit Court of Appeals correctly exercised its discretion in dismissing the cross-petitioners' attempted appeal of the denial of their motion to dismiss for forum non conveniens. As stated by Professor Moore,

> where an interlocutory order is properly appealed and review is

> sought of an incidental discretionary order, the appellate court should not review the discretionary order where there is no showing of an abuse of discretion. . . . The same principle should be applied where, along with the review of an appealable interlocutory order, a litigant seeks review of a discretionary order which grants or denies transfer of an action under the doctrine of forum non conveniens.

9 Moore's Federal Practice 110.25[1] at 272-273. Indeed, in Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F.2d 577, 578n.1 (1st Cir. 1969), relied upon so heavily in this case by the cross-petitioners and the court of appeals on the injunction issue, the First Circuit recognized that on an appeal from an injunction a district court refusal to grant a motion to dismiss on the grounds that a portion of the case should be decided in a foreign court was not appealable.

No abuse of discretion appears in the instant case. The cross-petition argues the merits of the motion to dismiss for forum non conveniens, and no response to such argument is required here. Clearly a review of the complaint and cross-petitioners' amended answer demonstrates that the "issues in dispute," argued in the cross-petition (C-P at 25) to be controlling on the question of forum non conveniens, deal exclusively with persons, events and documents found in the United States and the Republic of Guinea, and not at all in London.

Further, even if cross-petitioners could demonstrate that the court of appeals had the power to exercise jurisdiction over the appeal of the district court's denial of the motion to dismiss, the exercise of that power is discretionary in the court of appeals. In Marcera

v. Chinlund, 595 F.2d 1231, 1236n.8 (2d Cir.), vacated on other grounds, 442 U.S. 915 (1979), the Second Circuit stated that it could entertain the denial of class certification, an interlocutory order, because it had jurisdiction under 28 U.S.C. 1292(a)(1) over an appeal from an order denying a preliminary injunction. "We may, in our discretion, review the entire order appealed" (emphasis added). In General Motors Corp. v. New York, 501 F.2d 639, 648 (2d Cir. 1974) the Second Circuit determined that it would be inappropriate to exercise its "discretionary power" to take pendent jurisdiction over an interlocutory order granting class action status while entertaining an appeal on a separate issue. Similarly, in the instant case the Third Circuit has determined not to entertain an interlocutory appeal of the forum non conveniens issue.

If the court of appeals had the power to hear the appeal, its decision not to exercise that power was discretionary and no basis for granting the cross-petition for writ of certiorari can arise from that decision.

CONCLUSION

For the reasons stated above, the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

Cloyd R. Mellott
Dale Hershey
Robert W. Doty
Jordan S. Weltman

Counsel for Cross-respondent

Supplemental
Brief

Office - Supreme Court, U.S.
FILED
NOV 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-440

In the
Supreme Court of the United States

October Term 1981

The Insurance Corporation of Ireland, Ltd., Eagle Star Insurance Co., Ltd., Hanover Insurance Company, Continental Assurance Company Of London Ltd., The Century Insurance Co. Ltd., Yuval, The Insurance Company Of Israel Ltd., Home Insurance Co., Ltd., Slater, Walker Insurance Co. Ltd., Yasuda Fire & Marine Insurance Co. (UK) Ltd., Nichido Fire & Marine Insurance Co. Ltd., Turegum Insurance Company, Sahar Insurance Co. Ltd., Excess Insurance Co., Ltd., Trident Insurance Co. Ltd., Stronghold Insurance Co. Ltd., British Reserve Insurance Co. Ltd., English & American Insurance Co. Ltd., Consolidated European Reinsurance Co. Ltd.,

Cross-petitioners,

v.

Compagnie Des Bauxites De Guinee,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Motion Of Cross-Respondent To Recall The Writ Of Certiorari

CLOYD R. MELLOTT
(Counsel of Record)
DALE HERSHEY
ROBERT W. DOTY
ROBERT L. BYER
JORDAN S. WELTMAN

ECKERT, SEAMANS, CHERIN
& MELLOTT
42nd Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
412-566-6000
Counsel for Cross-respondent

Financial Press Corporation, Pittsburgh

TABLE OF CONTENTS

Page

Grounds for the Motion 1

Conclusion 7

TABLE OF AUTHORITIES

CASES

Page

American Construction Co. v. Jacksonville, T. & K.R. Co., 148 U.S. 372 (1893) 6

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967) 6

Compagnie des Bauxites de Guinea v. Insurance Co. of North America, 651 F.2d 877 (3d Cir. 1981) 2

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) 6

Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik, G.M.B.H., ____ F.2d ____, No. 81-1118 (3d. Cir. Sept. 11, 1981) 6

Estelle v. Gamble, 429 U.S. 97 (1976) 6

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 6

Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U.S. 251 (1916) 6

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969) 3

STATUTES

28 U.S.C. §1291 4

428 U.S.C. §1292(a)(1) 2, 3

RULES OF COURT

Fed.R.Civ.P. 12(b)(2) 4

Fed.R.Civ.P. 37(b)(2)(A) 2, 4

Fed.R.Civ.P. 54(b) 4

MOTION OF CROSS-RESPONDENT TO RECALL THE WRIT OF CERTIORARI

Cross-respondent Compagnie des Bauxites de Guinee (hereinafter "CBG") respectfully moves for recall of the Writ of Certiorari granted in this case on November 2, 1981 pursuant to a cross-petition. CBG is filing this Motion because the procedural posture of this case is now such that cross-petitioners are no longer aggrieved by the injunction which cross-petitioners appealed to the Court of Appeals, and the discovery and other rulings which would be reviewed by this Court pursuant to the Cross-Petition and Writ are interlocutory in nature. CBG, therefore, respectfully suggests that the disposition of the Court of Appeals is not a final judgment and that the Writ should be recalled as inappropriate in light of the changed circumstances. CBG notes, however, that the issue raised by this Motion would be moot if the Court were to grant CBG's Petition for Writ of Certiorari at No. 81-290. That Petition has not yet been acted upon by the Court, and CBG continues its request that its Petition be granted.

GROUNDS FOR THE MOTION

On August 11, 1981, CBG filed a Petition for Writ of Certiorari (No. 81-290) to the United States Court of Appeals for the Third Circuit seeking review of the June 10, 1981 decision of that Court which reversed an injunction granted by the District Court.[1] The injunction was ancillary to a pending diversity action for damages and enjoined cross-petitioners from pursuing litigation which they filed in England against CBG almost 3½ years after the pending action but involving issues which had already been raised as defenses in the action pending before the District Court. *Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877 (3d Cir. 1981) (App. 1a). Although the Court of Appeals reversed the injunction, it ordered that the case be remanded to the District Court for further proceedings, including trial of the original claim for damages.

---

[1] The Court of Appeals also held that the District Court lacked personal jurisdiction to enjoin three defendants. Although CBG's Petition at No. 81-290 also seeks review of that question, that aspect of the Court of Appeals decision is not relevant to this Motion. Those three defendants are not among the cross-petitioners.

The case initially came before the Court of Appeals on an appeal by cross-petitioners from the grant of the injunction. The Court of Appeals had jurisdiction of the case solely by virtue of 28 U.S.C. §1292(a)(1) (appeal as of right from interlocutory order granting injunction).

Cross-petitioners raised two issues in their challenge to the injunction before the Court of Appeals. First, they asserted that the District Court erred in failing to dismiss the case for lack of personal jurisdiction.[2] The Court of Appeals rejected that contention.[3] Second, they asserted that the District Court lacked the power to enjoin parties from conducting an action in a different sovereignty. The Court of Appeals, while not fully agreeing with cross-petitioners' second argument, reversed the injunction on the basis of comity.[4]

---

[2] The District Court found personal jurisdiction on several bases. First, four of the cross-petitioners conceded jurisdiction. Second, some of the cross-petitioners previously had written policies for CBG and had delivered those policies in the forum state and district. Third, the cross-petitioners adopted the terms of an underlying policy of insurance issued and delivered in the forum state. Apart from these findings of sufficient contact with the forum state to render cross-petitioners subject to its jurisdiction, and in the alternative, the District Court entered sanctions against cross-petitioners for their repeated failure to comply with several Orders directing them to produce documents relevant to the question of personal jurisdiction, the sanction consisting of a finding of jurisdiction pursuant to Fed.R.Civ.P. 37(b)(2)(A).

[3] The Court of Appeals held that the District Court did not abuse its discretion by taking as established the facts necessary to find personal jurisdiction as a justifiable sanction for cross-petitioners' inexcusable failure to comply with discovery orders. The Court of Appeals, therefore, did not reach the issue of whether the evidence on the record, apart from the sanction, was sufficient to establish that cross-petitioners' activities constituted doing business in the forum state. 651 F.2d at 866, n. 9 (App. 17a).

After CBG filed its Petition for Writ of Certiorari seeking review of the order reversing the injunction, the cross-petitioners filed their Cross-Petition raising in this Court the question of whether the discovery sanction denied them due process of law.[5]

The Court of Appeals has jurisdiction to consider the discovery and personal jurisdiction issues raised by cross-petitioners at this stage of the case only because cross-petitioners appealed from a District Court order granting an injunction, an interlocutory order made appealable as of right under 28 U.S.C. §1292(a)(1).[6] Cross-petitioners were able to raise these issues in the context of an appeal from an injunction because, as the Court of Appeals recognized, "[a] district court must have personal jurisdiction over a party before it can enjoin its actions. *See Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 112, 89 S. Ct. 1562, 1570, 23 L.Ed.2d 129 (1969)." 651 F.2d at 880 (App. 5a). Were it not for the fact that cross-petitioners' attempt to further delay the action before the District Court by instituting harassing litigation in England forced the District Court to issue an injunction, there would have been no basis for cross-petitioners to bring before the Court of Appeals prior to the completion of discovery, trial and final judgment the propriety of the District Court's imposition of discovery sanctions and finding of personal jurisdiction.[7] Thus, review of the sanctions issue is limited to and conditioned upon review of the injunction.

---

[4] Cross-petitioners also pressed in the Court of Appeals their contention that the District Court erred in denying their motion to dismiss on the basis of *forum non conveniens.* The Court of Appeals, however, held that the order was "inherently interlocutory" and not appealable at this stage of the proceedings. 651 F.2d at 887-888 (App. 20a).

[5] The Cross-Petition also raised the *forum non conveniens* question, but the Court did not grant certiorari on that question.

[6] See Opinion of Judge Gibbons dissenting in part in the Court of Appeals, 651 F.2d at 888 (App. 21a).

On November 2, 1981, this Court granted the Cross-Petition for Writ of Certiorari, limiting review to the propriety of the discovery sanction imposed by the District Court. The Court, however, has not yet acted upon CBG's Petition for Writ of Certiorari. Thus, as of now, the Order of the Court of Appeals reversing the injunction will stand, and there is no final appealable order of which cross-petitioners are aggrieved.

If this Court does not review the Order of the Court of Appeals reversing the injunction, cross-petitioners in effect would be in the position of having requested this Court to review interlocutory orders of the District Court denying a motion for summary judgment[8] and imposing sanctions under Fed.R.Civ.P. 37(b) for violations of discovery orders, in advance of any final judgment following the completion of pretrial discovery and a trial on the merits. These hardly are matters worthy of this Court's consideration in the absence of a final judgment disposing of the litigation. We respectfully suggest that to review this case on certiorari under the current procedural posture would allow an end-run maneuver by cross-petitioners to defeat the congressional mandate in 28 U.S.C. §1291 that appellate review normally be confined to final orders. The issues raised in the cross-petition can and should be decided after final judgment following trial on the merits.

---

[7] Cross-petitioners never asked the District Court to certify the jurisdictional question under 28 U.S.C. §1292(b) or Fed.R.Civ.P. 54(b), nor would such a certification have been appropriate.

[8] Cross-petitioners did not raise the personal jurisdiction issue in the District Court by motion to dismiss under Fed.R.Civ.P. 12(b)(2). Rather, they filed an answer on the merits which included a denial that the District Court had subject matter jurisdiction of the suit or jurisdiction over them. They later filed an Amended Answer which specifically raised personal jurisdiction as an affirmative defense. The personal jurisdiction question first came before the District Court when cross-petitioners moved for summary judgment on that question approximately a year and one-half after commencement of the action.

Under the mandate of the Court of Appeals, this case would be remanded to the District Court for further proceedings, including the completion of discovery and trial. Those additional proceedings will result in evidence in addition to that placed on the record in the injunction proceedings which will further support the findings of fact made by the District Court which caused it to conclude that cross-petitioners were doing business in the forum state, an alternative basis dispositive of the jurisdiction issue rendering decision of the question upon which the Court granted the Cross-Petition unnecessary.[9]

CBG believes that the District Court properly enjoined cross-petitioners from proceeding with harassing litigation in England and that the Court of Appeals erroneously reversed the injunction. CBG, therefore, believes and submits that the Court should grant certiorari for the reasons stated in its Petition at No. 81-290.

---

[9] Although this case and two companion cases had been filed in the District Court in late 1975, discovery was far from completed at the time of the District Court's ruling of April 19, 1979. For example, at the present time a total of 88 witnesses have been deposed, 34 of whom are representatives of the excess insurers. However, at the time of the District Court's ruling, only 24 depositions had been taken, and none of the excess insurer representatives had been deposed. Virtually all of the depositions of excess insurer representatives were taken during the months of July, August and September, 1979. In addition, a substantial amount of discovery from the excess insurers was completed after April 19, 1979 by means of answers to interrogatories, document productions and requests for admissions. The status of pretrial discovery at the time of the District Court's ruling was due in part to the fact that the excess insurers had requested and were granted a stay of substantially all pending discovery until determination of their motion for summary judgment raising the jurisdiction argument. The stay was granted on June 14, 1978 and was in effect at the time of the District Court's ruling of April 19, 1979. Certain discovery relating to jurisdiction over the excess insurer defendants was not stayed, and it was their refusal to comply with this discovery that resulted in the sanctions imposed by the District Court.

If, however, the Court does not grant CBG's Petition for Writ of Certiorari to review the reversal of the injunction, then we respectfully submit that the Court's certiorari policy would be served by recalling or dismissing the Writ granted under the Cross-Petition, given the procedural posture of this case and the absence of any final judgment disposing of the entire litigation. Under the current posture, review at this time of the question upon which certiorari was granted under the Cross-Petition would appear to be inconsistent with this Court's "normal practice of denying interlocutory review". *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893). *Cf. Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 232 (1979) (Rehnquist, J., concurring) (absent extraordinary circumstances, orders granting or denying discovery are not immediately reviewable); *Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik, G.M.B.H.*, ___ F.2d ___, No. 81-1118 (3d. Cir. Sept. 11, 1981) (discovery orders and sanctions for violating discovery orders are interlocutory and not immediately appealable). Clearly, review prior to final judgment of the discovery sanction imposed in this case is not "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause", *American Construction Co. v. Jacksonville, T. & K.R. Co., supra*, and, especially in the context of this case[10], would frustrate the policies underlying the requirement that appellate review ordinarily be confined to a single appeal after final judgment ending the litigation on the merits. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-374 (1981).

---

[10] See discussion of cross-petitioners' dilatory tactics in the Opinion of the Court of Appeals in this case, 651 F.2d at 881-885 (App. 6a-13a, 15a).

CONCLUSION

For the above reasons, CBG respectfully moves this Honorable Court to recall or dismiss the Writ of Certiorari granted under the Cross-Petition, unless the Court grants CBG's Petition for Certiorari at No. 81-290. CBG urges the Court to consider this Motion at the earliest possible time. Cross-petitioners have presented to the Clerk a request for a thirty-day extension of the schedule for filing their brief and a joint appendix. That request should not delay the Court's consideration of this Motion, which questions the timeliness of the Court's presently reviewing the sanctions issue. Unless the Court were to grant the writ of certiorari sought by CBG, the Court's writ as to the sanctions issue should be recalled, thus obviating the need for any extension of a briefing schedule as sought by cross-petitioners.

Respectfully submitted,

CLOYD R. MELLOTT
(Counsel of Record)
DALE HERSHEY
ROBERT W. DOTY
ROBERT L. BYER
JORDAN S. WELTMAN
ECKERT, SEAMANS, CHERIN
& MELLOTT
42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

Counsel for Cross-respondent

Dated: November 12, 1981

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-440

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO., LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONERS

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, Pennsylvania 15230
412-288-3144

Counsel of record
for Cross petitioners

Of counsel:

THOMAS P. LAWTON III

October 9, 1981

HERBICK & HELD PRINTING CO., 1117 WOLFENDALE STREET, PITTSBURGH, PA. 15233

TABLE OF CONTENTS

PAGE

Table of Authorities i

Reply to Cross-Respondent's Answer re Statement of the Case 1

Reply to Cross-Respondent's Answer to Argument on Jurisdiction 2

Reply to Cross-Respondent's Answer to Argument on Forum non Conveniens 6

Conclusion 8

TABLE OF AUTHORITIES

CASES

	PAGE
Antico v. Hondo of Camden, 85 F.R.D. 34 (E.D.Pa. 1979)	5
Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969)	6
G-K Properties v. Redevelopment Agency, Etc., 577 F.2d 645 (9th Cir. 1978)	5
General Motors Corporation v. City of New York, 501 F.2d 639 (2d Cir. 1974)	7
Hanson v. Denckla, 357 U.S. 235 (1958)	2
Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D.Mass. 1976)	4
Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979)	7
Marshall v. Segona, 621 F.2d 763 (5th Cir. 1980)	5

CASES	PAGE
Mid-America Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497 (E.D.Wis. 1978)	4
National Hockey League v. Met Hockey Club, 427 U.S. 639 (1976)	5
Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962)	3
State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978)	5

COURT RULES

F.R.C.P. 33(c)	4
F.R.C.P. 37	2

REPLY TO CROSS-RESPONDENT'S ANSWER RE STATEMENT OF THE CASE

Cross-respondent states (Brief in Opposition, pp. 1, 4) that "The issue before the district court was never *where* the documents would be produced, but *whether* the cross-petitioners would produce information at all," and that cross-petitioners failed "to produce the requested information anywhere." This is completely incorrect. The District Court found that on November 24, 1978 cross-petitioners had offered to produce their files "at their offices in London for inspection by plaintiff" (71a).[1]

Cross-respondent argues (Brief, p. 3) that "cross-petitioners' averments . . . that they do no business in Pennsylvania also are flatly contradicted by the findings of the district court." The point is not whether cross-petitioners' averments (i.e., in their petition) were contradicted by the findings, but whether those findings were supported by evidence. Cross-respondent cites none, relying solely on the findings themselves which the District Court made at the conclusion of the preliminary injunction hearing (47a-48a) and the same findings which the District Court repeated (78a) after the final hearing as the source for his conclusion that he had in personam jurisdiction over cross-petitioners.

Cross-respondent made this same argument in its petition for certiorari at No. 81-290 (pp. 22-23) seeking review of the ruling of the Court of Appeals that three of the respondents were not subject to jurisdiction in Pennsylvania. Respondents answered this argument (brief in opposition at No. 81-290, pp. 9-11) by pointing out that findings made on a preliminary injunction hearing are subject to refutation by evidence at the final hearing and that respondents had been barred from obtaining or offering any refutation evidence by Judge Simmons' orders (57a, 59a). Petitioner (cross-respondent here) in its Brief in Reply (at No. 81-290) has made no attempt to answer this argument. For a court to base a finding, even in part, on evidence which cross-petitioners were barred from answering denies them due process of law.

---

[1] Not "at their various home office locations in England, Brussels and Tel Aviv", as cross-respondent later states (Brief, p. 5)

In addition, cross-respondent has made no attempt to answer cross-petitioners' argument (cross-petition, pp. 14-16) that the District Court's jurisdictional findings were fatally deficient because they did not find that cross-petitioners had performed any acts purposely availing themselves of the privilege of conducting activities in Pennsylvania and invoking the benefits and protection of its laws, as required by *Hanson v. Denckla*, 357 U.S. 235, 253-4 (1958).

REPLY TO CROSS-RESPONDENT'S ANSWER TO ARGUMENT ON JURISDICTION

Cross-respondent states (Brief in Opposition, pp. 3-7) that cross-petitioners brought only a small part of the records to Pittsburgh, an admitted fact. Cross-respondent would hold cross-petitioners to the original undertaking of their former New York counsel to bring all the records to Pittsburgh. This undertaking was made before he had ascertained the magnitude of the task (44a). Cross-respondent makes no attempt to answer cross-petitioners' argument (cross-petition, pp. 11, 12) that the transportation of four million files across the Atlantic Ocean was a practical impossibility, and that the District Court's order requiring this was an abuse of discretion. "Rule 37 is not a legal requirement of the impossible": *Read v. Ulmer*, 308 F.2d "915, 918 (5th Cir. 1962).

Cross-respondent argues (Brief, p. 8) that one of the defendants, Consolidated European Reinsurance Co. Ltd., had filed a response stating that it had insured only six risks in Pennsylvania representing .02% of its gross income. Consolidated European purported to produce all its records of such Pennsylvania business, but it turned out that the files produced pertained to only three Pennsylvania risks which it had insured. Whether the six was a mistake or whether the records of the other three were lost is immaterial. In either event the uncontradicted evidence conclusively proves that Consolidated European did not have sufficient contact with Pennsylvania to be subject to personal jurisdiction. The imposition of the sanction against it and the finding of jurisdiction based upon that sanction was totally unwarranted.

Cross-respondent argues (Brief, p. 6-7) that cross-petitioners' offer to open their entire home office files did not comply with the order to produce. This was exactly what cross-respondent sought. It wished to examine all evidence of cross-petitioners' Pennsylvania business (Brief, p. 4), being unwilling to accept their word[2]. To make sure that cross-petitioners were withholding noth-

---

[2] Proceedings December 21, 1978 (Appendix in Court of Appeals, p. 535a):

> "MR. MELLOTT: ... In view of some of the other statements in the affidavits, that, obviously, I can't believe, I am not willing to accept your representation that one per cent is all they are doing.
>
> MR. BRUCKMANN: Well, what good is it to research the documents if you don't believe us no matter what we say?
>
> MR. MELLOTT: Because *if we see the files, I will know what policies you are writing.*" (emphasis supplied).

B

ing, cross-respondent needed to see every piece of paper in their files[3]. Cross-petitioners were willing to permit this in London.

Cross-petitioners' files were arranged and indexed geographically according to the continent in which the risk was located, but not according to political subdivisions. Thus to find Pennsylvania risks it would have been necessary to examine the North American files. The amount of work involved to do this would have been the same for each party. The general rule is that when compliance with a discovery request is equally burdensome, the burden must be borne by the party seeking the discovery: *Mid-America Facilities, Inc. v. Argonaut Ins. Co.*, 78 F.R.D. 497 (E.D.Wis. 1978), where Chief Judge Reynolds in denying plaintiffs' motion to compel discovery pointed out (p. 498) that it would take either party "thirty days to go through the records to obtain the desired information." If "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," F.R.C.P. 33(c) gives the party served the right "to specify the records from which the answer may be derived or ascertained" and make those records available. The specifications must be "in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained."[4] The principle governing answers to interrogatories applies with equal logic to responses to requests for documents.

---

[3] In view of this, the remarks of the Court in *Kozlowski v Sears, Roebuck & Co.*, 73 F.R.D. 73, 76-77 (D.Mass. 1976), quoted by cross-respondent (Brief, pp. 8-9), are inapposite, even if they were good law, which appears doubtful.

[4] Cf. the amendment of April 29, 1980 (effective August 1, 1980) to rule 34(b) permitting a party producing documents for inspection to "produce them as they are kept in the usual course of business . . .."

Cross-respondent could ascertain as easily as cross-petitioners which documents covered Pennsylvania risks. Therefore cross-petitioners' offer to produce their North American files, as well as any other files cross-respondent desired to examine, complied with cross-respondent's request for documents.

Cross-respondent argues (Brief, pp. 10-13) that wilfulness is a prerequisite of only the extreme sanction of dismissal or a default judgment, and that a less severe sanction may be imposed for a non-wilful failure to comply with discovery. Until the decision in the case at bar, no court had held any sanction at all to be permissible when the non-compliance was due to impossibility. The general principle that a party should not be subject to the supreme sanction of dismissal when non-compliance is the result of inability to comply *(National Hockey League v. Met Hockey Club*, 427 U.S. 639, 640 (1976); *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980)) logically applies to any sanction, however light or however severe. As shown above (p. 2), failure to produce documents because it was not possible to produce them is not a violation of the federal rules.

Cross-respondent argues (Brief, pp. 15-16) that a belated offer to produce is insufficient to vacate a sanction, citing *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), where the delay in production was intentional and wilful, *G-K Properties v. Redevelopment Agency, Etc.*, 577 F.2d 645 (9th Cir. 1978), where the original refusal was wilful and compliance was tendered at the last minute, and *Antico v. Hondo of Camden*, 85 F.R.D. 34 (E.D. Pa. 1979), in which the Court imposed, not the requested sanction of default, but only a monetary sanction of costs and attorneys' fees. The first two of those cases are not applicable because their rulings were based on wilfulness, whereas in the case at bar the District Court made no finding of wilfulness. The third case, *Antico*, is precisely in point: if any sanction should be imposed, it should be monetary only.

REPLY TO CROSS-RESPONDENT'S ANSWER TO ARGUMENT ON FORUM NON CONVENIENS

Cross-respondent argues (Brief, p. 19) that the District Court's refusal of defendants' motion to dismiss for forum non conveniens was not appealable, citing footnote 1 to the opinion in *Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969), for the proposition that the District Court's failure to pass upon a question raised by the defendant, reserving it for later disposition, was not appealable even on defendant's appeal from an injunction. A failure to consider a question is not an appealable order because it is not an order at all. If this ruling was in conflict with the three cases cited in the cross-petition (p. 23) holding that the denial of a motion to dismiss is reviewable on an appeal from an injunction, it furnishes an additional ground for granting the cross-petition.

Cross-respondent argues (Brief, p. 20) that the issues in dispute "deal exclusively with persons, events and documents found in the United States and the Republic of Guinea and not at all in London." The exact opposite is true. The principal issue on the merits of the case is whether the representatives of plaintiff's London insurance broker withheld information from the London underwriters who accepted the risk in London on behalf of defendant insurance companies, all of which (except for the Belgian defendant) have offices in London. All the persons, all the events and all the documents involved in that issue are in London. Cross-petitioners have been unable to take the depositions of some of those persons (the representatives of plaintiff's London insurance broker) because they successfully objected, before the High Court of Justice in London, to giving their depositions in the present action. At a trial in London, however, they can be made to testify.

Cross-respondent's final argument (Brief, pp. 20-22) is that it lay in the Court of Appeals' discretion whether or not to review the district court's denial of cross-petitioners' motion to dismiss for forum non conveniens, citing *Marcera v. Chinlund*, 595 F.2d 1231, 1236 fn. 8 (2d Cir. 1979), vacated on other grds., 442 U.S. 915, and *General Motors Corporation v. City of New York*, 501 F.2d 639, 648 (2d Cir. 1974). In the latter case, Chief Judge Kaufman said (p. 648) that the guiding principle in the exercise of the appellate court's discretion was "whether review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order." Factors relevant to the forum non conveniens order were clearly involved in the appealable order in the case at bar, with respect to which the Court of Appeals reviewed the district court's order on jurisdiction in personam, as Judge Gibbons pointed out in his dissenting opinion (21a-22a). The majority of the Court of Appeals, however, did not exercise any discretion whatever, but refused to consider the forum non conveniens question on the ground that it could not be reviewed at all because it was nonappealable (20a). This was error, as cross-respondent now appears to admit. (Brief pp. 20-22).

CONCLUSION

Cross-respondent has failed to answer the basic reason for granting the cross-petition: that the decision sought to be reviewed is squarely in conflict with a very recent decision of the Court of Appeals for the Fifth Circuit on the jurisdiction question, which the court below expressly refused to follow (16a). Cross-respondent has also failed to answer cross-petitioners' argument that foreign corporations not having sufficient contacts with Pennsylvania to make it reasonable to subject them to suit here on a cause of action based on events which occurred abroad should not be subject to an order of a Pennsylvania court to bring their voluminous records to Pennsylvania and then be required to defend plaintiff's claim here because they did not do so. The importance of this to the United States in its ever-expanding relationships with foreign countries is manifest.

Respectfully submitted,

EDMUND K. TRENT

REED SMITH SHAW & MCCLAY
P. O. Box 2009
747 Union Trust Building
Pittsburgh, Pennsylvania 15230
412-288-3144

Counsel of record for
Cross-Petitioners

Of counsel:
THOMAS P. LAWTON III
October 9, 1981

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR CROSS-PETITIONERS

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, PA 15230
412-288-3144

Counsel of record
for Cross-petitioners

Of counsel:
Thomas P. Lawton III
Kenneth K. Kilbert

HERRICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15233

QUESTIONS PRESENTED

1. Before jurisdiction over non-resident defendants has been established, may a court properly order them to comply with discovery requirements relating to jurisdiction over their persons, and upon their failure to do so, impose a sanction finding them subject to jurisdiction?

2. If a court may properly impose such discovery requirements and sanction on non-resident defendants, may it do so in the absence of a prima facie showing by plaintiff of evidence to support a finding of personal jurisdiction over them?

3. Is an order for production of documents, followed by a sanction for failing to obey it, proper

a) when the documents are not in defendants' possession, custody or control?

b) when defendants' failure to produce them was not wilful, but was the result of impossibility?

PARTIES TO PROCEEDING IN COURT OF APPEALS

In addition to the parties named in the caption of the case in this court, the following were appellants in the Court of Appeals:*

Vesta (UK) Ltd.

Chiyoda Fire & Marine Insurance Co. Ltd., Tokyo

L'Union Atlantique S.A. d'Assurances, Brussels

LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONERS PURSUANT TO SUPREME COURT RULE 28.1 AS AMENDED

A list of the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of each of the cross-petitioners having any such related corporations is set forth in appendix N to the cross-petition for certiorari, pages 91a-94a. Said listing is hereby amended for three of the cross-petitioners as follows:

Sahar Insurance Co., Ltd.

Above company has two partially owned subsidiaries, Sahar Holdings (1967) Limited and Sahar Securities Limited, and one affiliated company, Tsamaret Insurance Agency, all of which are active only in Israel.

---

*Mercantile & General Reinsurance Co. Ltd., erroneously named in the caption in the Court of Appeals, was not a party to the appeal, the action having been dismissed as to it by the District Court after its obligations had been assumed by The Insurance Corporation of Ireland, Ltd. (276a). The caption in the District Court was amended to delete Mercantile & General's name (1a).

Trident Insurance Co. Ltd.

Previous listing amended to read as follows:

Stock is owned entirely by Reinsurance Underwriting Services Limited, a British corporation with its head office in London, all the stock of which is owned by General Reinsurance Corporation of Connecticut, a Delaware corporation with its head office in Greenwich, Connecticut. All the stock of the latter is owned by General Re Corporation, a Delaware corporation with its head office in Greenwich, Connecticut.

British Reserve Insurance Co. Ltd.

Previous listing amended to read as follows:

Stock is owned by Riunione Adriatica di Sicurta, S.p.A., two of the latter's wholly owned subsidiaries, (RAS International Holdings, S.A. and Internationale Unfall- und Schadensversicherung Gesellschaft) and one individual.

TABLE OF CONTENTS

PAGE

Questions Presented i
Parties to Proceeding in Court of Appeals ii
Listing of Parents, Subsidiaries and Affiliates of Petitioners Pursuant to Supreme Court Rule 28.1 as Amended ii
Table of Contents iv
Table of Authorities vi
Opinions Below 1
Jurisdiction 1
Statement of the Case 2
Summary of Argument 8
Argument 10

I. The Sanction Order Was Unjustified Because Defendants Were Not Subject To the District Court's Jurisdiction 10

  A. A sanction order for failure to produce documents cannot properly be imposed upon non-residents until personal jurisdiction over them has been established 10

  B. A non-resident defendant does not subject himself to the jurisdiction of the court for discovery purposes by moving to dismiss for lack of personal jurisdiction 17

II. If a Court May Order Non-Resident Defendants To Make Discovery Prior To a Finding of Personal Jurisdiction, It May Do So Only Upon a Prima Facie Showing By the Plaintiff of Evidence Which Would Support Such a Finding ... 22

TABLE OF AUTHORITIES

CASES PAGE

Aetna Business Credit v. Universal Decor, 635 F.2d 434 (5th Cir. 1981) 11
Amba Marketing Systems, Inc. v. Jobar International, Inc. 551 F.2d 784 (9th Cir. 1977) 20, 22
Anderson v. British Overseas Airways Corp., 149 F.Supp. 68 (S.D.N.Y. 1956) 31
In re Anthracite Coal Antitrust Litigation, 82 F.R.D. 364 (M.D. Pa. 1979) 34-35
Bank of America Nat. Trust & Sav. Ass'n. v. Douglas, 105 F.2d 100 (D.C. Cir. 1950) 30
Barbato v. Tuosto, 38 Misc.2d 823, 238 N.Y.S.2d 1000 (Supr. Ct. Monroe Co. 1963) 35
Beauchamp v. United States, 76 F.2d 663 (9th Cir. 1935) 13
Blair Holdings Corp. v. Rubinstein, 159 F.Supp. 14 (S.D.N.Y. 1954) 21
Bowman v. General Motors Corp., 64 F.R.D. 62 (E.D. Pa. 1974) 29, 30
Compagnie Continentale d'Importation, v. Pacific Argentine Brazil Line 1 F.R.D. 388 (S.D.N.Y. 1940) 29
Compagnie des Bauxites de Guinea v. Insurance Co. of North America, 651 F.2d 877 (3d Cir.), *cert. granted* 50 U.S.L.W 3351 (1981) 19
Davis v. Asano Bussan Co., 212 F.2d 558 (5th Cir. 1954) 17
DeParcq v. United States District Court for Southern District of Iowa, 235 F.2d 692 (8th Cir. 1956) 13
Doff v. Brunswick Corp., 372 F.2d 801 (9th Cir 1966), *cert. den.* 389 U.S. 820 (1967) 24

PAGE

III. The Sanction Order Was Unjustified Because the Production Order Was An Abuse of Discretion 28

A. A party can properly be required to produce documents only if they are in his possession, custody or control 28

B. The documents in question were not in defendants' possession, custody or control 28

C. Voluminous documents need be produced only at the place where they are kept 29

D. Defendants could properly be required to produce their documents only at their home offices where they were kept 33

IV. The Sanction Order Was Itself An Abuse of Discretion 34

A. A sanction order for failure to produce documents cannot properly be imposed upon a party unless the failure was wilful 34

B. The District Court in the case at bar made no finding that defendants' failure to produce the documents sought was wilful, and there was no evidence of wilfulness 36

C. The sanction violated traditional notions of fair play and substantial justice 37

Conclusion 39

PAGE

Donnely v. Copeland Intra Lenses, Inc., 87 F.R.D. 80 (E.D.N.Y. 1980) 13

Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) 35

Dunn v. Trans World Airlines, Inc., 589 F.2d 408 (9th Cir. 1978) 36

Earle v. McVeigh, 1 Otto (91 U.S.) 503 (1876) 12

Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) ... 35

Edinburgh Assur. Co. v. R. L. Burns Corp., 479 F.Supp. 138 (C.D. Cal. 1979) 24

English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), *Cert. den.* 444 U.S. 832 (1979) . 10, 11, 17, 19, 20

Familia de Boom v. Arosa Mercantil S.A., 629 F.2d 1134 (5th Cir. 1980), *cert. den.* 101 S.Ct. 2345 (1981) 11, 12, 13, 15

First National Bank v. Western Casualty and Surety Co., 598 F.2d 1203 (10th Cir. 1979) 13

Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) 35

Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975) 36

Fraley v. Chesapeake & Ohio Railway, 397 F.2d 1 (3d Cir. 1968) 17

GFI Computer Industries, Inc. v. Fry, 476 F.2d 1 (5th Cir. 1973) 30

G. & P. Amusement Co. v. Regent Theater Co., 9 F.R.D. 721 (N.D. Ohio 1949) 29

Gielow v. Warner Bros. Pictures, 26 F.Supp. 425 (S.D.N.Y. 1938) 29

Grane v. Cooper, 4 Myl. & C. 263, 41 Eng. Repr. 103 (Ch. 1838) 29

Hanson v. Denckla, 357 U.S. 235 (1958) 13, 23, 27

PAGE

Harris v. Sunset Oil Co., 2 F.R.D. 93 (W.D. Wash. 1941) 29

Haykel v. G.F.L. Furniture Leas. Co., 76 F.R.D. 386 (N.D. Ga. 1976) 29

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 12, 23, 37

Intern. Union, etc. v. National Right to Work, 590 F.2d 1139 (D.C. Cir. 1978) 15, 28

Jacobs v. Kennedy Van Saun Mfg. & Eng. Corp., 12 F.R.D. 523 (M.D. Pa. 1952) 29

Kulko v. Superior Court, 436 U.S. 84 (1978) 12

Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87 (2d Cir. 1975) 17, 19, 20, 22

Lekkas v. Liberian M/V Caledonia, 443 F.2d 10 (4th Cir. 1971) 17, 19, 20

Lincoln Laboratories, Inc. v. Savage Laboratories, Inc., 27 F.R.D. 476 (D. Del. 1961) 13

Lundberg v. Welles, 93 F.Supp. 359 (S.D.N.Y. 1950) 30, 33

McGee v. International Life Insurance Co., 355 U.S. 220 (1957) 28

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) 22

Martin v. New York State Department of Mental Hygiene, 588 F.2d 371 (2d Cir. 1978) 19

Martin v. N.V. Nederlandsche Amerikaanesche Stoomvart Maatchappij, 8 F.R.D. 363 (S.D.N.Y. 1948) 28

Mid-American Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497 (E.D. Wisc. 1978) 29

Milliken v. Meyer, 311 U.S. 457 (1940) 37

Mooney Aircraft, Inc. v. Donnelly, 402 F.2d 400 (5th Cir. 1968) 13

PAGE

Niagara Duplicator Co. v. Shackleford, 160 F.2d 25 (D.C. Cir. 1947) 30

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92 (C.D. Cal. 1971) 23

O'Hare International Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971) 20

Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) 14

Pennoyer v. Neff, 5 Otto (95 U.S.) 714 (1877) 12, 13

Petroleum Financial Corp. v. Stone, 111 F.Supp. 351 (S.D.N.Y. 1953) 23, 31

Rapoport v. Sirott, 418 Pa. 50, 209 A.2d 421 (1965) 32

Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) 35

River Plate Corp. v. Forestal Land, Timber & Railway Co., 185 F.Supp. 832 (S.D.N.Y. 1960) 17, 21

Shaffer v. United States, 528 F.2d 920 (4th Cir. 1975) 15

Shaffer v. Heitner, 433 U.S. 186 (1977) 23, 27

Socialist Workers Party v. Attorney General of the United States, 375 F.Supp. 318 (S.D.N.Y. 1974) 17, 23

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 34

Societe Internationale pour Par., Etc. v. Clark, 9 F.R.D. 263 (D.D.C. 1949) 30

Surpitski v. Hughes-Keenan Corp., 362 F.2d 254 (1st Cir. 1966) 17, 22

Unicon Management Corp. v. Koppers Co., 250 F.Supp. 850 (S.D.N.Y.), aff'd 366 F.2d 199 (2d Cir. 1966) 25

United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir.), cert. den. 384 U.S. 919 (1966) 20

United States v. Reynolds, 345 U.S. 1 (1953) 15

United States v. Sherwood, 312 U.S. 584 (1941) 14

PAGE

United States v. United Mine Workers, 330 U.S. 258 (1947) 18

In re Uranium Antitrust Litigation, 480 F.Supp. 1138 (N.D. Ill. 1979) 10-11

Urquhart v. American-La France Foamite Corp., 144 F.2d 542 (D.C. Cir.), cert. den. 323 U.S. 783 (1944) 17

Von der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir.), cert. den. 370 U.S. 916 (1962) 36

Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974) 20

Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977) 17, 18

Williamson v. Capital Transit Co., 215 F.2d 487 (D.C. Cir. 1954) 13

Wise v. Herzog, 114 F.2d 486 (D.C. Cir. 1940) 13

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 12

STATUTES

28 U.S.C. § 1254(i) 1

British Evidence (Proceedings in Other Jurisdictions) Act of May 22, 1975, c.34 15

COURT RULES

F.R.C.P. 12 19

F.R.C.P. 28(b) 15

F.R.C.P. 30(a) 15

F.R.C.P. 34 .... 16, 28

F.R.C.P. 37 .... 34, 35

F.R.C.P. 45(d) 15

F.R.C.P. 82 14

Pa. R.C.P. 4008 32

OPINIONS BELOW

The District Court did not write an opinion. The District Court did file a preliminary statement, findings of fact and conclusions of law in support of the permanent injunction (342a), parts of which (351a-353a, 356a-357a) relate to question 1 of the cross-petition. These findings and conclusions are unreported. The opinion of the Court of Appeals (361a) is reported at 651 F.2d 877.

JURISDICTION

The judgment of the Court of Appeals (391a) was entered June 10, 1981. Timely petitions for rehearing were denied on July 7, 1981. Appellee in the Court of Appeals (plaintiff in the district court) filed a petition for certiorari on August 11, 1981. Appellants in the Court of Appeals (defendants in the district court) filed their cross-petition for certiorari on August 31, 1981. This Court granted the cross-petition for certiorari on November 2, 1981. The grant of certiorari was limited to the subject of the District Court's jurisdiction over defendants' persons, question 1 of the cross-petition. The jurisdiction of this Court to review the judgment of the Court of Appeals rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiff-appellee below, cross-respondent here, sued cross-petitioners (as well as three other insurance companies which were also defendant-appellants below but are not cross-petitioners)[1] in the District Court for the Western District of Pennsylvania on contracts of insurance made in England (347a).[2]

All the defendants later filed suit against plaintiff in London seeking, inter alia, a declaration that the insurance contracts were void ab initio because of plaintiff's non-disclosure of material facts at the time the risk was accepted (370a). On plaintiff's motion (141a), the District Court, the Honorable Paul A. Simmons, enjoined defendants from further prosecuting their English suit (204a, 338a), and they appealed to the Court of Appeals for the Third Circuit (360a), all but four asserting lack of jurisdiction over their persons (367a) and all of them asserting failure to accord comity to the British court (378a) and forum non conveniens (380a).

The Court of Appeals, in an opinion by Judge Aldisert joined by Chief Judge Seitz (361a), reported in 651 F.2d 877, upheld the District Court's findings of personal jurisdiction over all but three of the defendants[3], reversed and vacated the injunction, and held the District Court's refusal to dismiss for forum non conveniens not reviewable. Judge Gibbons dissented (381a) from the affirmance of the ruling on personal jurisdiction and from the refusal to review the ruling on forum non conveniens. He agreed with the majority on the release of the three defendants for want of personal jurisdiction and on the vacation of the injunction (381a). Rehearing en banc, sought by defendant-appellants, was denied.[4]

---

[1] One other British company, Mercantile & General Reinsurance Co. Ltd., was also originally named as a defendant. By order entered October 26, 1976, consented to by all parties, it was dropped from the case (1a).

[2] Page numbers followed by "a" refer to the joint appendix.

[3] This statement of the case will not cover the slightly different facts relating to defendant L'Union Atlantique S.A. d'Assurances, Brussels, a Belgian corporation with its headquarters in Brussels, because it is not among the cross-petitioners, being one of the three defendant-appellants released from jurisdiction by the Court of Appeals (378a).

Plaintiff then filed a petition for certiorari as to the injunction, and defendants, except for the three who had been released, filed a cross-petition as to the jurisdiction and forum non conveniens questions. On November 2, 1981, the Court granted the cross-petition on only the jurisdiction question, without acting on plaintiff's petition relating to the injunction. Plaintiff's motion to recall the writ granted to defendants was denied on November 30, 1981.

Plaintiff, Compagnie des Bauxites de Guinee ("CBG"), a Delaware corporation not having its executive offices in Pennsylvania and not registered or doing business in Pennsylvania (342a), on December 11, 1975 (1a) filed its complaint in two counts, the first (8a) against defendant Insurance Company of North America ("INA") on a policy of business interruption insurance issued in Philadelphia in the amount of $10,000,000, and the second (10a) against twenty-two[5] non-Pennsylvania companies (the "excess insurer defendants")[6] on contracts of insurance made in London (347a)[7] providing business interruption coverage of $10,000,000 in excess of the first $10,000,000 written by INA (¶17, 11a). The property to which both layers of coverage related was a railway and a bauxite processing plant in the Republic of Guinea, west Africa (¶16, 11a). Purported service was made on the Pennsylvania Commissioner of Insurance in Harrisburg (1a).

---

[4] Rehearing by the panel, sought by plaintiff-appellee, was also denied.

[5] Including the British company subsequently dropped from the case, footnote 1, supra (p. 2).

Plaintiff filed two requests for documents, on November 19, 1976 and July 14, 1978, respectively (22a, 67a). As supplemented (93a, 100a), they asked defendants to produce in Pittsburgh their files containing copies of all policies they had written for insureds in Pennsylvania, or covering risks in Pennsylvania, or emanating from brokers in Pennsylvania. At the hearing on July 27, 1978, on defendants' objections, one of their New York attorneys[8], who were then in charge of the case for them, informed the Court that defendants did not retain copies of the insurance policies which they had written, and that copies of the policies were in the hands of the London insurance brokers for the various insured parties (94a). Pursuant to the Court's direction (95a, 352a), defendants undertook to obtain copies of the policies from the London brokers (96a).

---

[6] Since INA was not party to the appeal, the excess insurer defendants will be referred to simply as "defendants."

[7] This was plaintiff's intent. The complaint actually pleaded (¶16, 11a) a contract made by plaintiff with its own agent (266a).

[8] Their appearance was later withdrawn (7a).

Defendants' counsel had not realized the volume of papers involved (113a), for, upon making investigation in London, he learned that the brokers' records, as well as defendants', were not indexed by states (99a, 106a, 107a) and that it would be necessary to examine more than four million files (99a) to select those involving Pennsylvania (107a). On his return, he offered, on November 24, 1978[9], to produce all defendant-cross-petitioners' records at the places where they were kept in England, except for those of Sahar Insurance Co., which were offered in Tel Aviv (99a, 103a, 352a). Those records contained, not policies, but the placing slips constituting the contracts (331a) of insurance written by defendants. "The policy is only purported evidence of the contract" (331a).

Plaintiff then filed a motion to compel (100a), and at the hearing on December 21, 1978, defendants' New York attorney offered to stipulate that defendants derived one percent of their premium income from Pennsylvania (109a). Plaintiff's counsel was unwilling to accept this figure, saying that he desired to examine all defendants' files to verify it (110a). Defendants' New York attorney then repeated his offer that the files were available for inspection in London (110a).

Plaintiff's counsel did not respond to the offer to inspect the files in London or elsewhere, but stated that any defendants who would consent to the denial of their motion for summary judgment for want of personal jurisdiction would not be required to comply with the order for production (109a, 119a). Such consent not being forthcoming, the Court ordered defendants to produce the policies within sixty days (119a).

---

[9] This was within the extended time for production allowed by the Court (98a).

Defendants then sent letters to the London brokers requesting copies of the desired policies. Most of the brokers answered saying that the task of extracting them from their files was impossible, impracticable, or too burdensome and time-consuming (432a-468a). Plaintiff then filed a motion for an order holding that defendants were engaged in business in Pennsylvania sufficient to give the Court in personam jurisdiction over them (121a).

On March 22, 1979, defendants filed suit in the High Court of Justice, Queen's Bench Division, seeking to avoid (the British term for "rescind") the contracts of insurance made by them in London (480a), on the ground of non-disclosure of certain material facts of which they had first learned in November, 1978. On April 12, 1979, plaintiff filed in the present action a motion to enjoin the English suit (141a).

At the preliminary injunction hearing on April 18 and 19, 1979, plaintiff's counsel, to prove personal jurisdiction over the seventeen defendants which were contesting it, offered extracts from the transcripts of the arguments and hearings as summarized above (pp. 4-6). At the conclusion of the hearing on April 19, the District Court imposed a sanction on defendants finding that they were subject to the in personam jurisdiction of the court (200a), entered a preliminary injunction (204a), and set June 25 for hearing on permanent injunction (205a).

Defendants having promptly appealed (4a), plaintiff on May 8 served, and on May 21 filed, a motion to continue the permanent injunction hearing until the Court of Appeals had decided the appeal (205a). On June 1, 1979, defendants served notice of depositions to be taken in England (209a), and on June 15 plaintiff moved for a protective order restricting the scope of the depositions to exclude all evidence relating to in personam jurisdiction (210a).

On June 25, 1979, the Court granted both motions, entering orders which barred defendants from obtaining by discovery or presenting at the final hearing further evidence relating to in personam jurisdiction over them (226a, 227a). Defendants, in order to avoid delay, then discontinued their appeal from the preliminary injunction, and the Court fixed dates in August for the permanent injunction hearing.

After further postponement, the hearing on making the injunction permanent was held on November 5, 6 and 7, 1979 (239a). On August 5, 1980 Judge Simmons handed down his findings (242a), conclusions (356a) and orders denying defendants' motion to dismiss for forum non conveniens (7a), holding that he had personal jurisdiction over defendants (356a) and making the injunction permanent (358a). Defendants duly appealed (360a).

The District Court determined that he had in personam jurisdiction over defendants on the basis of his findings at the preliminary injunction hearing, which he said were the law of the case (356a). At that hearing he had found that defendants were doing business in Pennsylvania because they had offered to stipulate that they derived at least one percent of their premium income from Pennsylvania business (197a), because they provided coverage to various types of citizens of Pennsylvania through brokers having offices in Pennsylvania (198a), and because they had failed to comply with plaintiff's discovery requests seeking to determine what policies they had written covering insureds or risks in Pennsylvania or emanating from Pennsylvania brokers (198a). The Court also found that they had agreed to submit to jurisdiction because they had adopted the terms of the INA policy (199a), because they derived profits from Pennsylvania (199a), and because they knew that the policy they wrote would be sent to Pennsylvania (199a).

The Court made no finding that defendants had purposely availed themselves of the privilege of conducting activities in Pennsylvania, that they had invoked the benefits and protections of Pennsylvania laws, or that they had any reason to expect to be haled before a Pennsyivania Court.

Although the District Court based his jurisdiction ruling not only on the sanction but on other evidence as well (356a-357a), the Court of Appeals' affirmance was based only on the sanction (377a). The Court of Appeals did not pass upon the District Court's additional determination, apart from the sanction, that defendants' activities supported a finding that they were doing business in Pennsylvania (377a).

SUMMARY OF ARGUMENT

Although a court has jurisdiction to determine its own jurisdiction, it cannot properly make an order of any kind against a person named as a defendant if it has no jurisdiction over him. By moving to dismiss for want of jurisdiction he does not waive any rights in this respect.

Until personal jurisdiction over the named defendant has been established, there is a split of authority as to whether the court can properly order him to produce his records relating to the jurisdiction question. The better view is that an order for production would deny the defendant due process of law.

The plaintiff's necessity does not justify denying due process to defendants. There was no necessity in the present case to order defendants as parties to produce their records in the forum. Plaintiff could have obtained the records by engaging in discovery against defendants as non-party witnesses at their home offices.

If the contrary view is followed, the court can properly order production of a defendant's records relating to jurisdiction only upon a prima facie showing, by affidavits or testimony, that there is jurisdiction. Plaintiff in the case at bar made no prima facie showing of the requisite activities by defendants in the forum state to support jurisdiction over them, and the district court made no findings of such requisite activities by them. The findings the court did make were not supported by the record.

A sanction order must be based upon a valid discovery order. A discovery order directing a defendant to produce documents is valid only if the documents are in his possession, custody or control. The documents upon which the sanction order in the present case was based were not in the possession, custody or control of defendant insurers; they were in the possession of agents for the insureds.

Production of voluminous documents must take place where they are kept. It is an abuse of discretion to require voluminous documents to be transported long distances to the forum in which the action is pending. The district court's order in the present case that defendants produce voluminous documents in the forum was an abuse of discretion, and therefore the sanction order based upon their non-production in the forum was a denial of due process.

Failure to comply with discovery requests will justify sanctions only if the failure was wilful. There was no evidence in the case at bar that defendants' failure to produce the requested documents in the forum was wilful, and the district court made no finding of wilfulness. Their failure to produce voluminous records at the forum was the result, not of wilfulness, but of impossibility.

ARGUMENT

I. THE SANCTION ORDER WAS UNJUSTIFIED BECAUSE DEFENDANTS WERE NOT SUBJECT TO THE DISTRICT COURT'S JURISDICTION

A. A Sanction Order For Failure to Produce Documents Cannot Properly Be Imposed Upon Nonresidents Until Personal Jurisdiction Over Them Has Been Established.

The first question here involved is whether a district court may properly enforce an order requiring one named as a defendant to produce records without first establishing (by admissions from the pleadings, uncontradicted affidavits or evidence) that the court has jurisdiction over the named defendant's person. In the case at bar the District Court did not consider this question (356a). The Court of Appeals, however, did address themselves to it, stating (369a) that defendants "recognized that the court had jurisdiction to determine whether it could properly exercise personal jurisdiction over them"—which defendants concede—and therefore that it could compel discovery to aid in the resolution of that issue"—which defendants did not recognize and do not concede.[10]

In support of their conclusion the Court of Appeals cited (369a) *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979), cert. den. 444 U.S. 832 (1979), and *In re*

---

[10] The Court of Appeals also stated (369a) that defendants "never questioned the district court's power to order production of their records." Defendants did question such power, by their objections to plaintiff's request for documents (26a, 68a). Their New York counsel nevertheless attempted to obtain the requested documents (98a).

Uranium Antitrust Litigation, 480 F.Supp. 1138 (N.D. Ill. 1979). Although the Court of Appeals in the *English* case found (p. 728 fn. 6) that defendant Delaware corporation had sufficient minimum contacts with Nebraska (apart from the sanction) and (fn. 5) that it had waived its objection to the district court's jurisdiction over its person, the Court did say (also in fn. 5) that a court has jurisdiction to determine jurisdiction and that "a party cannot hope to avoid the jurisdiction of a court by concealing evidence regarding its activities in the forum state." In the *Uranium* case, the District Court for the Northern District of Illinois, in answer to the objection to jurisdiction made by one of the defendants, Noranda Mines, Ltd., an Ontario corporation, stated (p. 1151) that he had jurisdiction to determine his jurisdiction over the parties, and that in the exercise of that jurisdiction "we may compel discovery to aid our resolution of the personal jurisdiction issues."

The opposite conclusion was reached in *Familia de Boom v. Arosa Mercantil S.A.*, 629 F.2d 1134 (5th Cir. 1980),[11] cert. den. 101 S.Ct. 2345 (1981), in which the District Court for the Southern District of Texas, refusing to consider defendants' motion to dismiss for want of jurisdiction in personam, had entered default judgments against the two defendants for their failure to answer, or to answer responsively, plaintiffs' interrogatories relating to the court's jurisdiction over their persons. In reversing the default judgments for plaintiffs, the Court of Appeals, speaking through Judge Reaveley, aptly stated the Court's reasons (p. 1139):

---

[11] Followed in *Aetna Business Credit v. Universal Decor*, 635 F.2d 434 (5th Cir. 1981).

> "Although the district court undoubtedly has jurisdiction to determine its own jurisdiction, it cannot, on its own, establish jurisdiction. . . . Although Rule 37 allows for the imposition of a sanction for failure to comply with discovery, it may be used only against parties who are within the court's jurisdiction."

The holding of the Court of Appeals in *Familia de Boom* was in accord with the fundamental principle of due process that "a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant." *Kulko v. Superior Court,* 436 U.S. 84, 91 (1978). See *World-Wide Volkswagen Corp. v. Woodson,* 441 U.S. 286, 291 (1980); *International Shoe Co. v. Washington,* 326 U.S. 310 (1945); *Pennoyer v. Neff,* 5 Otto (95 U.S.) 714, 720 (1877); *Earle v. McVeigh,* 1 Otto (91 U.S.) 503 (1876). Personal jurisdiction requires the existence of "minimum contacts" between the defendant and the forum State. *International Shoe Co. v. Washington,* 326 U.S. at 316. As the Court stated in *World-Wide Volkswagen Corp. v. Woodson,* (444 U.S. at 291-92):

> "*The concept of minimum contacts,* in turn, can be seen to perform two related, but distinguishable functions. It *protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.*" (Emphasis supplied.)

Although the principle that a State may not exercise its judicial power beyond its borders has been somewhat relaxed, this Court has emphasized that restrictions on the personal jurisdiction of the courts still remain as "a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). It remains a valid rule that "Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power, and be resisted as mere abuse." *Pennoyer v. Neff*, supra, 5 Otto (95 U.S.) at 720.

It is axiomatic that process emanating from a court lacking the requisite power over the defendant is "ineffectual," *Donnely v. Copeland Intra Lenses, Inc.*, 87 F.R.D. 80, 83 (E.D.N.Y. 1980), and the court's proceedings are "void from the very outset." *Mooney Aircraft, Inc. v. Donnelly*, 402 F.2d 400, 406 (5th Cir. 1968), citing, *Williamson v. Capital Transit Co.*, 215 F.2d 487, 489-90 (D.C. Cir. 1954). And as was said in *Wise v. Herzog*, 114 F.2d 486, 488 (D.C. Cir. 1940), where the jurisdictional prerequisites have not been fulfilled, "the court lacks power to act."

Thus, disobedience of a mandate, judgment, or decree issued by a court without jurisdiction over the parties cannot be punished as contempt: *DeParcq v. United States District Court for Southern District of Iowa*, 235 F.2d 692 (8th Cir. 1956); *Beauchamp v. United States*, 76 F.2d 663 (9th Cir. 1935). Similarly, the court in which an action is pending cannot impose and enforce a sanction against a non-party witness who refuses to answer questions at his deposition given outside the forum state: *First National Bank v. Western Casualty and Surety Co.*, 598 F.2d 1203 (10th Cir. 1979); *Lincoln Laboratories, Inc. v. Savage Laboratories, Inc.*, 27 F.R.D. 476, 480 (D. Del. 1961).

In the case at bar the Court of Appeals refused (376a) to follow the *Familia de Boom* case, without answering the argument that a court cannot validly make an order against a person over whom it has no jurisdiction. By ordering the non-resident defendants at bar to produce records in Pennsylvania and subjecting them to personal jurisdiction and a possible judgment against them for not doing so, the District Court attempted to extend its jurisdiction beyond the territorial limits of Pennsylvania and the United States without any statutory authority to do so. The rules of civil procedure do not create or enlarge the jurisdiction of the federal courts: *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978); *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941); F.R.C.P. 82.

The Court of Appeals attempted to justify its decision on practical grounds: that plaintiff's only means of proving defendants subject to jurisdiction in Pennsylvania was from records in their possession (376a). This reason does not make an order against a non-resident over whom personal jurisdiction is lacking any less a denial of due process of law. The result of the Court of Appeals' decision, were it to stand, would be to permit a plaintiff to obtain discovery against anybody in the world simply by naming him as a defendant in a complaint and making an affidavit that he did business in the forum state.

Even if plaintiff's only means of proving personal jurisdiction over the non-resident defendants at bar was from their records, this did not warrant the court's order requiring them to produce such records pursuant to plaintiff's request before jurisdiction over their persons had been established. Necessity of the plaintiff cannot justify denial of due process to the defendants. Before resorting to illegal or even doubtful means to enable plaintiff to obtain the evidence it needed, the District Court should have been required to attempt to find a solution to plaintiff's problem consistent with due process.

Such a requirement was recognized by the Court of Appeals in the *Familia de Boom* case. Although they reversed the default judgment which the district court had entered for plaintiffs, the Court was fully aware of plaintiffs' predicament and held that plaintiffs should be given further opportunity to obtain evidence to support jurisdiction over defendants. This was in accordance with the principle followed in cases involving noncompliance with discovery requests because of constitutional privilege: *United States v. Reynolds*, 345 U.S. 1 (1953); *Intern. Union, etc. v. National Right to Work*, 590 F.2d 1139, 1152 (D.C. Cir. 1978); *Shaffer v. United States*, 528 F.2d 920 (4th Cir. 1975). In all those cases judgments in favor of appellees based on the failure of the opposing party to produce privileged documents were set aside, on the ground that the appellees should first have attempted to obtain the desired information from other available sources.

The same principle should be followed in cases like the present, where the plaintiff needs the defendant's records to prove jurisdiction over him. The plaintiff can easily obtain such records by taking the defendant's deposition as a non-party witness at his domicile, securing his attendance and records by a subpoena duces tecum pursuant to F.R.C.P. 30(a) and 45(d).

This procedure is available to plaintiff at bar. Under F.R.C.P. 28(b) and the British Evidence (Proceedings in Other Jurisdictions) Act of May 22, 1975, c. 34, letters of request can be issued by the forum court in America to the Justices of Her Majesty's High Court of Justice in London, pursuant to which an order will be made (by a standing master of the Queen's Bench Division of the court) directing the witnesses to appear before a named examiner (appointed in the master's order), produce documents, and be examined under oath or affirmation. The transcript with copies of the exhibits will then be forwarded to the District Court in Pittsburgh, as in the case of a deposition taken in another American state. Plaintiff can thus obtain the evidence it needs without violating defendants' constitutional rights.

Defendants at bar, being willing to produce their records in London, as the District Court found (352a), will waive the issuance of letters of request and the service of subpoenas upon them, and will produce their records voluntarily. If, after they have done so, plaintiff still desires to examine the policies in the brokers' files, subpoenas may be served upon the brokers to produce them. This solution of plaintiffs' problem will bring about the same result as if defendants had produced their records pursuant to plaintiff's requests for documents served upon them as parties under F.R.C.P. 34, except that the files will be made available in London rather than in Pittsburgh, with a saving of much time and expense to both plaintiff and the excess insurers.

B. A NON-RESIDENT DEFENDANT DOES NOT SUBJECT HIMSELF TO THE JURISDICTION OF THE COURT FOR DISCOVERY PURPOSES BY MOVING TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

Plaintiff cross-respondent will doubtless point to other cases, in addition to *English v. 21st Phoenix Corp.*, discussed above (p. 11), that have held or suggested that a court can order a defendant to comply with plaintiff's discovery requests prior to a showing that the court has personal jurisdiction over the defendant.[12]

The courts recognize, though, that compelling a defendant to comply with discovery orders is itself an assertion of personal jurisdiction to some extent. *Socialist Workers Party v. Attorney General of the United States*, (fn. 12), 375 F.Supp. at 325. Significantly, the courts in many of these cases fail to offer any authority or rationale for why they can exercise jurisdiction over the defendant for discovery purposes before the plaintiff has shown that the non-resident defendant has the requisite contacts with the forum state. In the remaining cases, the rationales tendered by the courts are conclusory and unpersuasive.

---

12. *See, e.g.*, *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977); *Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87 (2d Cir. 1975); *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971); *Fraley v. Chesapeake & Ohio Railway*, 397 F.2d 1 (3d Cir. 1968); *Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254 (1st Cir. 1966); *Davis v. Asano Bussan Co.*, 212 F.2d 558 (5th Cir. 1954); *Urquhart v. American-La France Foamite Corp.*, 144 F.2d 542 (D.C. Cir.), cert. den. 323 U.S. 783 (1944); *Socialist Workers Party v. Attorney General of the United States*, 375 F. Supp. 318 (S.D.N.Y. 1974); *River Plate Corp. v. Forestal Land, Timber & Railway Co.*, 185 F.Supp. 832 (S.D.N.Y. 1960).

Courts have stated that if the defendant cannot be forced to comply with discovery requests until after it has been shown that he is subject to the court's jurisdiction, then plaintiff may be foreclosed from obtaining evidence in support of its allegation that the defendant has the requisite nexus with the forum: *Urquhart v. American-La France Foamite Corp.*, supra (p. 17 fn. 12), 144 F.2d at 544. As explained above (p. 14), however, the plaintiff's need for information does not permit a court to deny the defendant's right to due process.

Other courts have rationalized their exercise of power over a defendant challenging jurisdiction by citing *United States v. United Mine Workers*, 330 U.S. 258, 292 fn. 57 (1947) for the proposition that a court has "jurisdiction to determine its own jurisdiction": *Wells Fargo & Co. v. Wells Fargo Express Co.*, supra (p. 17 fn. 12), 556 F.2d at 430 fn. 24. The *United Mine Workers* decision, though, held only that the federal trial court, which clearly had subject matter and personal jurisdiction in the case, could enforce an order maintaining the status quo pending a determination by the court of its power to award a specific form of relief. The principle that a court has "jurisdiction to determine its own jurisdiction" cannot properly be invoked to allow a court, which has not been shown to have jurisdiction over a defendant, to require such defendant to perform the affirmative act of producing documents.

A third rationale invoked by the courts is that when the defendant moves to dismiss for lack of personal jurisdiction, he submits himself to the court's jurisdiction for the purpose of his motion, thereby giving the court power to decide the motion and, incidental thereto, the power to compel defendant to produce evidence sought by plaintiff for purposes of responding to the motion. *See*

Lehigh Valley Industries, Inc. v. Birenbaum, supra (p. 17 fn. 12), 527 F.2d at 93, and *Lekkas v. Liberian M/V Caledonia*, supra (p. 17 fn. 12), 443 F.2d at 11. The Court of Appeals in *English v. 21st Phoenix Corp.*, supra (p. 10), adopted this reasoning in ruling that it had jurisdiction to enter the sanction order because the acts of the defendants in that case had amounted to a "waiver" of their right to object to the court's exercise of personal jurisdiction. 590 F.2d at 728 fn. 5. While personal jurisdiction may be waived, it is ludicrous to suggest that a defendant has in any way submitted himself to the court's jurisdiction in personam merely by moving to dismiss for lack of jurisdiction in personam.[13] The very purpose of rule 12(b)(2) of the Federal Rules of Civil Procedure is to allow the moving party to challenge the court's jurisdiction over his person without submitting himself to the court's jurisdiction: *Martin v. New York State Department of Mental Hygiene*, 588 F.2d 371, 373 (2d Cir. 1978). Indeed, the only way for a defendant to avoid waiving his right to object to the lack of personal jurisdiction is to file a rule 12(b)(2) motion or, if no preliminary motion is made, raise the defense via a responsive pleading: F.R.C.P. 12(h)(1).

The defendants in the case sub judice, by filing a rule 12(b)(2) motion, did nothing more than was necessary to preserve their right to contest the court's exercise of jurisdiction over them. To hold that by filing the motion to dismiss they submitted to jurisdiction for discovery purposes would be anomalous, as defendants could have avoided the burden of complying with plaintiff's discovery requests only by submitting themselves to a default judgment against them. Defendants should not be penalized for raising the jurisdictional issue in advance of trial rather than permitting the entry of a judgment which would be unenforceable against them.

---

[13] The only other acts of the defendants were their failure to respond to discovery. Certainly, a party's flouting of a court's lack of jurisdiction does not imbue the court with jurisdiction over that party. *See Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877, 892, fn.4 (3d Cir. 1981) (Gibbons, J., dissenting, 389a).

Even assuming, arguendo, the correctness of the cases holding that a defendant's motion to dismiss gives the court jurisdiction over him for purposes of deciding the motion to dismiss, the District Court in this case nevertheless had no power to order the broad sanction it imposed.

In order to defeat a motion to dismiss for lack of personal jurisdiction, the plaintiff must make a prima facie showing that the non-resident defendant is subject to the jurisdiction of the court: *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977); *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). If the plaintiff succeeds in defeating defendant's motion to dismiss, the plaintiff is nevertheless not relieved of its burden of proving jurisdiction at trial by a preponderance of the evidence: *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 fn. 2 (7th Cir. 1971); *United States v. Montreal Trust Co.*, 358 F.2d 239, 242 fn. 4 (2d Cir.), cert. den. 384 U.S. 919 (1966).

The rationale of the *English*, *Lehigh Valley*, *Lekkas* and other like cases teaches that, by making a motion to dismiss, a defendant submits himself to the jurisdiction of the court only to the extent necessary for the court to decide the motion.[14] Therefore, the district court in this case had the power to issue only a sanction establishing that plaintiff had made a prima facie showing of jurisdiction and that defendant's motion to dismiss should be denied. The district court was powerless to impose a sanction affirmatively establishing jurisdiction, thereby absolving plaintiff from satisfying its burden of proving jurisdiction at trial. Plaintiff's counsel recognized this when he stated on the record (109a, 119a) that any defendants who would consent to the dismissal of their motion for summary judgment for want of personal jurisdiction need not produce any records. The Court of Appeals rejected the above argument without answering it (375a).

---

[14] Where a defendant has challenged the court's jurisdiction over him, the court must limit the scope of discovery so that, if the jurisdictional issue eventually is decided in defendant's favor, he will not have been subjected to unnecessary and burdensome discovery: *River Plate Corp. v. Forestal Land, Timber & Railway Co.*, 185 F.Supp. 832, 836 (S.D.N.Y. 1960); *Blair Holdings Corp. v. Rubinstein*, 159 F.Supp. 14, 15 (S.D.N.Y. 1954).

II. IF A COURT MAY ORDER NON-RESIDENT DEFENDANTS TO MAKE DISCOVERY PRIOR TO A FINDING OF PERSONAL JURISDICTION, IT MAY DO SO ONLY UPON A PRIMA FACIE SHOWING BY THE PLAINTIFF OF EVIDENCE WHICH WOULD SUPPORT SUCH A FINDING

The party seeking to invoke the jurisdiction of the court has the burden of establishing that jurisdiction exists: *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 179 (1936). If a defendant denies the plaintiff's jurisdictional allegations and prior to trial moves to dismiss, the court will dismiss the complaint unless the plaintiff satisfies its burden of showing that the defendant is subject to the jurisdiction of the court: *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977).

Where the defendant's affidavits in support of its motion to dismiss directly conflict on material points with the affidavits of the plaintiff in response to the motion, courts which permit discovery in aid of jurisdiction may defer ruling on the motion to dismiss pending discovery on the jurisdictional issue: *Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255 (1st Cir. 1966). Even such courts, however, will deny discovery and grant a motion to dismiss where the plaintiff has failed to make a prima facie or threshold showing that the defendant is subject to the court's jurisdiction. If a defendant denies all contacts with the forum state, the plaintiff, to be entitled to discovery, must in its affidavits set forth specific facts to support a finding that the court has personal jurisdiction over the defendant. Thus, discovery has been denied and defendant's motion to dismiss granted where plaintiff has set forth merely indefinite allegations of defendant's contacts with the forum state, *Lehigh Valley Industries, Inc. v. Birenbaum*, supra (p. 17 fn. 12), 527

F.2d at 93-94; *Socialist Workers Party v. Attorney General of the United States*, supra (p. 17 fn. 12), 375 F.Supp. at 322, 325, or facts insufficient, even if true, to sustain a finding of personal jurisdiction: *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 95-96 (C.D. Cal. 1971); *Petroleum Financial Corp. v. Stone*, 111 F.Supp. 351, 353-54 (S.D.N.Y. 1953).

Plaintiff's affidavits submitted in the present case fall far short of alleging any specific facts, or any facts, sufficient to bring defendants within the jurisdictional requirements of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *Hanson v. Denckla*, 357 U.S. 235 (1958), and *Shaffer v. Heitner*, 433 U.S. 186 (1977).

The principal affidavit (42a) relating to the insurance contracts made with defendants by plaintiff's London brokers, Bland Payne Ltd., formerly named Bland Welch & Co. Ltd. (¶1, 42a), is by David Glynne-Jones, executive company director. He was the person at Bland Payne in charge of placing the insurance at the request of the American brokers, Marsh & McLennan, Inc. (¶3, 43a). The only possible knowledge which he states defendants could have had that the insured had any connection with America would have come from documents in Bland Payne's placement file showing that the bonds issued by plaintiff in 1973 to finance the project in Guinea were guaranteed by six[15] aluminum companies, of which two were United States corporations (¶4, 43a), and stating that the plaintiff, CBG, was a joint venture in which the six aluminum producers were partners. Mr. Glynne-Jones states that though he did not personally have any discussions with underwriters for defendants, the information in the placement file "would have been available for underwriters' consideration in the course of negotiating the placement." (44a)[16]

---

[15] The exhibit attached to the affidavit would indicate seven, which is incorrect; it mistakenly lists the French company, Pechiney-Ugine, as two companies, Pechiney and Ugine.

The two Bland Payne employees, Messrs. Prisco and Prior, who did contact the underwriters personally, according to their affidavits (¶2, 48a, 49a), state (¶3, 48a, 49a) that they agree with the statements of fact in Mr. Glynne-Jones' affidavit, but, most significantly, they do not say that they mentioned to the underwriters the information which Glynne-Jones said "would have been available" to them. If they had mentioned it, they surely would have said so. There is thus no evidence that the underwriters knew that the risk had any American connection, and the inference is inescapable that they did not know.

Another affidavit relied on by plaintiff is that of Robert W. Doty, Esquire, the Pittsburgh attorney who signed the complaint in the present action (13a). He says (¶3, 54a) that when he conferred with a director of Bland Payne (Bland Welch), Gerald White, in London about a year after the complaint was filed, Mr. White told him that Bland Welch "gave information about C.B.G. to the excess insurers" and that they "would have been informed . . . that the producing broker was the Pittsburgh office of Marsh & McLennan, Inc., and that the Aluminum Company of America is one of the principal owners of C.B.G." (¶3, 55a). No affidavit was obtained from Mr. White. Mr. Doty's affidavit, not being based on personal knowledge, is of no weight at all. *Doff v. Brunswick Corp.*, 372 F.2d 801, 804 & fn. 1 (9th Cir. 1966), cert. den. 389 U.S. 820 (1967).

---

[16] Mr. Glynn-Jones correctly sets forth (¶6, 45a) the manner in which insurance contracts are made on the London market. The operations of the London insurance market are lucidly described in *Edinburgh Assur. Co. v. R. L. Burns Corp.* 479 F.Supp. 138, 144, 147, 151, 152 (C.D. Cal. 1979).

The next affidavit relied on by plaintiff is by Dale Hershey, Esquire, the Pittsburgh attorney who tried the case in the district court and argued it on appeal for plaintiff. He says (¶3, 56a) that Mr. White told him in a telephone conversation "that Bland Welch would have acted in London as agent for the underwriters, and that it would in turn have relied on Marsh & McLennan in Pittsburgh to act also as agent for the underwriters for the purpose of collecting the insurance premium from the insured, C.B.G., in Pittsburgh." (57a). These statements, relating to agency relationship, are conclusions of law, and are incompetent to establish any such relationship: *Unicon Management Corp. v. Koppers Company*, 250 F.Supp. 850, 852 (S.D.N.Y.), aff'd 366 F.2d 199 (2d Cir. 1966). Mr. White's agency statement reported by Mr. Hershey is flatly contradicted by the affidavit of James Roland Blake Fox-Andrews, Q.C., a British barrister experienced in insurance law and practices (¶2, 81a). He quotes from an opinion of an experienced British judge of the Court of Appeal (¶30, 84a) and explains categorically that the insured's broker is not the agent of the insurers to collect the premium (¶34, 86a). Mr. Fox-Andrews repeated and elaborated on these subjects in his testimony at the hearing on permanent injunction (300a, 313a).

Plaintiff also relied on an affidavit by Milton Beadling, a vice president of Marsh & McLennan, Inc. (¶1, 49a) in Pittsburgh (¶2, 50a). He described how he was requested by plaintiff to obtain for it business interruption insurance coverage for its facilities in Guinea and how he did this, stating that he supplied information about plaintiff to Bland Welch, including the fact that it was a Delaware corporation, that he was in Marsh & McLennan's Pittsburgh office, and that Aluminum Company of America was a major shareholder in Halco (Mining) Inc., a 51% owner of plaintiff (¶¶3, 4, 50a). Mr. Beadling also said (¶6, 51a) that "Marsh & McLennan in Pittsburgh acted as agent for INA and the excess insurers for purposes of delivering the policy and cover note to the insured and for purposes of collecting the premium from the insured." This proves nothing, for neither the policy nor the cover note was issued by defendants, and Marsh & McLennan collected the premium, not for the benefit of defendants (who had no claim against plaintiff for the premium), but for the benefit of Bland Payne, which under the law and practice of England was liable to defendants for the premiums as a principal obligor, not as agent for plaintiff (311a-312a). Mr. Beadling not being a lawyer, his conclusions of law on the agency questions were incompetent.

Mr. Beadling also said (¶9, 53a), or rather speculated, that if a policy had been prepared for defendants to sign, he knew of no reason why it would not have contained a clause subjecting them to suit in the United States. The simple answer to this is that according to London insurance practice relating to insurance of the type here involved, it would not be normal to have a clause permitting service of suit in a country other than where the risk was located (280a). It follows that English insurers are subject to suit only in London unless the placing slip specifies that they shall be subject to suit elsewhere (280a). Mr. Beadling was not shown to be familiar with the customs and practices of the London insurance market.

The final affidavit on which plaintiff relies is in the name of William B. Witney, purportedly senior vice president of Halco (Mining) Inc. (62a), 51% owner of plaintiff. This form of affidavit was not signed by Mr. Witney or by anyone else (65a). It states that Marsh & McLennan delivered the INA policy and the cover note to

Halco in Pittsburgh, and that Marsh & McLennan was not acting at the direction or under the control of Halco or C.B.G. It does not say that Marsh & McLennan was acting under anyone's direction or control. Marsh & McLennan were obviously carrying out part of what they had been engaged to do by or on behalf of plaintiff: obtain insurance coverage for the facilities in Guinea. The contents of the form of affidavit prove nothing, and, being unsigned, it is entitled to no weight whatsoever.

The final affidavit intended to show defendants' knowledge that they were insuring an American corporation was by Dale Hershey, Esquire, who identified documents relating to insurance coverage provided for plaintiff by one or more of the defendants. Six of these are cover notes relating to the insurance in suit and subsequent renewals of the coverage, thirteen were aircraft policies (only three of which were prior to the insurance in suit), two were cover notes relating to property damage to the facilities in Guinea, two were policies relating to wreck removals (one being prior to the insurance in suit), and one was a cover note relating to wreck removal. Ten of the aircraft policies and the two wreck removal policies contained clauses whereby the insurers would be subject to suit on the policies in any court of competent jurisdiction in the United States.

Conspicuous in all the above affidavits is the complete absence of anything indicating that any defendant took any affirmative action, or did anything at all, by which it purposely availed itself of the privilege of conducting activities within Pennsylvania, thus invoking the benefits and protections of its laws (*Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958)), and the complete absence of anything indicating that any defendant would have reason to expect to be haled before a Pennsylvania court (*Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)). Defendants were not shown to have solicited any business at all in Pennsylvania, the minimum prerequisite for jurisdiction over foreign insurance companies laid down in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

All contact, and knowledge of any connection, with Pennsylvania was categorically denied factually in affidavits made on personal knowledge of the underwriters for defendant insurers (39a-42a, 73a-81a), who believed they were reinsuring a Guinean company for a risk in Africa (271a).

III. THE SANCTION ORDER WAS UNJUSTIFIED BECAUSE THE PRODUCTION ORDER WAS AN ABUSE OF DISCRETION

A. A Party Can Properly Be Required to Produce Documents Only if They Are in His Possession, Custody or Control.

It is well settled that "the validity of the sanctions imposed under Rule 37(b)(2)(A) depends, in the first instance, on the validity of the discovery orders on which they were based:" *Intern. Union, etc. v. Nat. Right to Work*, 590 F.2d 1139, 1152 (D.C. Cir. 1978).

F.R.C.P. 34(a) requires a party to produce for his opponent only documents "which are in the possession, custody or control of the party upon whom the request is served." If the documents are in the possession or custody of the party's agent, they are in the control of the party: *Martin v. N.V. Nederlandsche Amerikaanesche Stoomvart Maatchappij*, 8 F.R.D. 363 (S.D.N.Y. 1948).

B. The Documents in Question Were Not in Defendants' Possession, Custody or Control.

The documents on account of which the District Court imposed the sanction upon defendants were not in their possession, but in the possession of the London brokers who had placed the insurance for the insureds (94a). Those brokers were not shown to be agents of defendant insurers. On the contrary, according to the undisputed evidence they were the agents of the insured (300a, 313a). There was no evidence that they were subject to defendants' control, and when defendants asked them for copies of the policies, most of them refused to produce them, although some of them did produce a few policies and cover notes (for examples, see 441a-443a, 470a, 474a-476a). One of the brokers claimed that the policies were confidential (468a).

It follows that the District Court's order compelling defendants to obtain the policies from the brokers (115a) was improper and the sanction for not complying with it (200a) was unjustified.

C. VOLUMINOUS DOCUMENTS NEED BE PRODUCED ONLY AT THE PLACE WHERE THEY ARE KEPT.

The general rule has long been[17] that a party whose documents his opponent wishes to inspect cannot be required to bring them to his opponent; the latter must go to the former's office to look at them.[18]

---

[17] For more than 140 years: *Grane v. Cooper*, 4 Myl. & C. 263, 41 Eng. Repr. 103 (Ch. 1838).

[18] *Mid-American Facilities, Inc. v. Argonaut Ins. Co.*, 78 F.R.D. 497 (E.D. Wisc. 1978); *Haykel v. G.F.L. Furniture Leas. Co.*, 76 F.R.D. 386 (N.D. Ga. 1976); *Bowman v. General Motors Corp.* 64 F.R.D. 62 (E.D. Pa. 1974); *Jacobs v. Kennedy Van Saun Mfg. & Eng. Corp.*, 12 F.R.D. 523 (M.D. Pa. 1952); *G & P. Amusement Co. v. Regent Theater Co.*, 9 F.R.D. 721 (N.D. Ohio 1949); *Harris v. Sunset Oil Co.*, 2 F.R.D. 93 (W.D. Wash. 1941); *Compagnie Continentale d'Importation v. Pacific Argentine Brazil Line*, 1 F.R.D. 388 (S.D.N.Y. 1940); *Gielow v. Warner Bros. Pictures*, 26 F.Supp. 425 (S.D.N.Y. 1938).

In *Bowman v. General Motors Corp.*, 64 F.R.D. 62 (E.D. Pa. 1974), Judge Becker in granting a motion to compel defendant to answer interrogatories and produce documents, said (p. 69, fn. 6):

> "... we believe that a large part of the burden created by the production of this information will have to be borne by the plaintiffs. Plaintiffs' counsel will have to sift through voluminous documents and other material in order to find either admissible evidence or items which may lead to further discovery and eventually to admissible evidence. Defendant's burden should be limited to answering the questions and identifying the documents required by our order and providing plaintiffs with reasonable access to such documents. *The production of these documents need take place only at Detroit, Michigan or such other places where the records may be stored.*" (Emphasis supplied.)

Where the distance is great, the above rule is applicable a fortiori: *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25 (D.C. Cir. 1947); *Bank of America Nat. Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100 (D.C. Cir. 1950); *Lundberg v. Welles*, 93 F.Supp. 359 (S.D.N.Y. 1950). In the last of these three cases, Chief Judge Knox said (p. 363):

> "... I believe it would be needlessly oppressive were defendant compelled to transport voluminous records from California for inspection here."

This principle was followed in *GFI Computer Industries, Inc. v. Fry*, 476 F.2d 1 (5th Cir. 1973).

When a party's records are in Europe, the party desiring to inspect them must go to Europe: *Societe Internationale pour Par., Etc. v. Clark*, 9 F.R.D. 263 (D.D.C. 1949). Plaintiff in that case, a Swiss corporation, brought suit under the Trading With The Enemy Act, to recover property seized by the Alien Property Custodian. Defendant sought the production of plaintiff's documents located in Switzerland. The court's order for their production required the inspection and copying to take place at plaintiff's office in Basel.

In the *Societe Internationale* case plaintiff was not required to bring its records to America even though plaintiff had filed its suit in Washington. It follows a fortiori that defendants, who did not invoke the court in America, should not have to bring their voluminous records here. They had repeatedly offered to make them available first at their home offices (99a, 103a, 114a, 115a), all but one of which were in England (428a-429a). They ultimately offered to produce them all in London (213a, 221a, 224a).

The rule that documents are to be inspected at the place where they are kept should be applied without exception where document production is sought from a non-resident defendant who is contesting the court's jurisdiction over his person. In such cases, the courts have recognized that their discretion to order discovery is limited, see *River Plate Corp. v. Forestal Land, Timber & Ry. Co.*, supra (p. 17 fn. 12), 185 F.Supp. at 836, and have refused to order non-resident defendants to leave their residences to make discovery in the forum state: *Anderson v. British Overseas Airways Corp.*, 149 F.Supp. 68 (S.D.N.Y. 1956); *Petroleum Financial Corp. v. Stone,* supra (p. 23). In the latter case, Judge Kaufman stated (111 F.Supp. at 353):

> "Plaintiff now seeks by the taking of depositions in New York to obtain further information to support its contention that H. C. Cockburn and the Cockburn Oil Corporation have been doing business in New York but it is unwilling to pay the costs for the deponents to come here from Texas. Even if the

> costs were to be borne by the plaintiff, it would appear that in seeking the depositions for this purpose, plaintiff is attempting to pull itself up by its own bootstraps. Absent the prior finding that the Cockburn Oil Corporation and H. C. Cockburn were doing business in this state, through Lee B. Stone, upon whom personal process is served, this Court would be exceedingly reluctant to exercise its discretion under Federal Rule 30(b) to compel parties to come to New York from Texas to determine whether this court in fact has jurisdiction over them. The plaintiff is, of course, at liberty to take such depositions in Texas and while plaintiff's counsel urges that a hostile atmosphere exists there, I refuse to believe that the courts of that jurisdiction would not extend their protection to insure that the plaintiff is not denied whatever rights it has."

A situation similar to that in the present case arose in *Rapoport v. Sirott*, 418 Pa. 50, 209 A.2d 421 (1965), where defendant, while contesting personal jurisdiction, refused to appear for a deposition in Pennsylvania, and a default judgment was entered against him by the Court of Common Pleas in Philadelphia, despite his offer to testify at his residence in Nevada. The Supreme Court vacated the judgment and remanded the case with instructions to direct defendant to appear for deposition in Nevada.[19]

---

[19] The Supreme Court also ordered defendant to pay plaintiff's counsel fees and expenses involved in taking the deposition in Nevada. This was in accord with Pa.R.C.P. 4008. Cross-petitioners at bar would not object to paying the fees and expenses of cross-respondent's counsel to examine the records in England if such records disclose sufficient activity by them in Pennsylvania to subject them to personal jurisdiction in Pennsylvania.

D. DEFENDANTS COULD PROPERLY BE REQUIRED TO PRODUCE THEIR DOCUMENTS ONLY AT THEIR HOME OFFICES WHERE THEY WERE KEPT.

The above authorities fully support defendants' objection to transporting more than four million files across the ocean from London to Pittsburgh, an obviously impossible (from any practical standpoint) thing to do. The District Court's orders (93a, 119a) requiring defendants to do so were wholly unreasonable.

The Court of Appeals agreed with the principle that documents may be required to be produced only where they are kept "when the requested material is so voluminous that copying and transporting it would prove unduly burdensome and oppressive." (371a). The Court of Appeals, however, accepted the District Court's finding "that CBG's request for documents was not burdensome," saying (372a) "we cannot conclude that these findings were erroneous, and thus it was well within the trial judge's discretion to order that the necessary documents be brought to Pittsburgh for examination by CBG instead of requiring CBG to inspect the records at the home office of each of the twenty-one insurance companies."

Defendants are not contending that plaintiff's request to examine four million files was unduly burdensome to defendants as a matter of law. Even though it will be burdensome as a factual matter for defendants to produce those documents, plaintiff is certainly entitled to look at them. Defendants' contention is that the requirement that they bring four million files to Pittsburgh is extremely burdensome and, in the language of Chief Judge Knox,[20] "oppressive." The mere statement of the requirement to move such a mass of papers should be sufficient to convince any reasonable person, whether Court or layman, that the trial judge abused his discretion in making the order, and that the majority of the Court of Appeals panel fell into error in affirming it.

---

[20] In *Lundberg v. Welles*, supra (p. 30) 93 F.Supp at 363.

IV. THE SANCTION ORDER WAS ITSELF AN ABUSE OF DISCRETION

A. A Sanction Order for Failure to Produce Documents Cannot Properly be Imposed Upon a Party Unless the Failure Was Wilful.

The general rule is that a party who attempts to comply with an order to produce documents but is unable to do so through no fault of his own will not be penalized: *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), where the Court reversed an order which had dismissed plaintiff's complaint because plaintiff had not produced records, the production of which would have violated Swiss penal laws. Mr. Justice Harlan said (p. 212) that rule 37 should not be construed to authorize dismissal because of petitioner's noncompliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not to wilfulness, bad faith or any fault of petitioner."

Mr. Justice Harlan also said (pp. 207-08) that the word "refuses" to produce in rule 37(b) meant no more than "fails" to produce. In 1970 the rule was amended by the substitution of "fails" and "failure" for "refuses" and "refusal". Thus, under the rule as construed before, and as written after, 1970, wilfulness was a prerequisite to the imposition of a sanction order. "*Any* order imposing sanctions on the Defendants for failure to comply with the discovery orders must be preceded by a finding that the defendants have acted willfully or in bad faith so as to obstruct the discovery by the Plaintiffs.": *In re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364, 368 (M.D. Pa. 1979) (emphasis supplied).

A wilful act is an act intentionally carried out in accordance with the will of the acting party.[21] But if that party is unable to do what he has been requested or ordered to do, his failure is not the result of wilfulness but of inability.[22] Before imposing a sanction, the court must conduct an evidentiary hearing to determine the question of the party's wilfulness, and failure to do so constitutes an abuse of discretion: *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir. 1977); *Flaks v. Koegel*, 504 F.2d 702 (2d Cir. 1974).

A sanction will be vacated when the court imposing it has made no finding that the failure was wilful, in bad faith or from lack of diligent effort, and the failure was due to inability to comply: *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970), where plaintiff's inability to produce the requested records arose from factual circumstances very similar to those in the case at bar. Plaintiff sued for the value of household goods and other property, including phonograph records made by her deceased husband, a well-known band leader, lost by defendants when they moved her furniture from Florida to California. Defendants propounded interrogatories asking her to describe in detail each missing or damaged phonograph record. Plaintiff attempted to obtain the necessary information from RCA Victor, but "RCA advised her attorney that the informa-

---

21. Wilful can even mean "unreasonable". *Barbato v. Tuosto*, 38 Misc.2d 823, 238 N.Y.S.2d 1000 (Supr. Ct. Monroe Co. 1963).

22. "Rule 37 is not a legal requirement of the impossible": *Read v. Ulmer*, 308 F.2d 915, 918 (5th Cir. 1962).

tion, if available, would require a search of the RCA Archives and that such a search would take many months." 423 F.2d at 860. The district court's order striking plaintiff's claims for the damages and lost records was vacated by the court of appeals.

The requirement of wilfulness obtains in all the other circuits where the question has been specifically dealt with: *Dunn v. Trans World Airlines, Inc.* 589 F.2d 408 (9th Cir. 1978); *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975); *Von der Heydt v. Kennedy*, 299 F.2d 459 (D.C. Cir.), cert. den. 370 U.S. 916 (1962).

B. THE DISTRICT COURT IN THE CASE AT BAR MADE NO FINDING THAT DEFENDANTS' FAILURE TO PRODUCE THE DOCUMENTS SOUGHT WAS WILFUL, AND THERE WAS NO EVIDENCE OF WILFULNESS.

The findings made by the District Court with respect to defendant's attempts to produce the requested documents contain nothing indicating that their failure was wilful. The requests asked for all insurance policies delivered in Pennsylvania or covering a risk located in Pennsylvania (22a, 67a). This was expanded to add policies emanating from Pennsylvania brokers (93a, 100a). When told that defendants did not have any policies at all in their possession, copies of such policies being retained by the London brokers (94a), the District Court ordered defendants to obtain them from the brokers (95a). The Court made no finding, however, that the policies were within defendants' control, and it turned out that they were not, for the brokers were unwilling to produce them, except for a few (432a-476a).

Any doubt on the question of wilfulness on the part of defendants is immediately dispelled by reference to the statements and actions of their former counsel from nous files in Pennsylvania which were not under their control and then asserting jurisdiction over them for their unintentional failure to do so was an unprecedented abuse of discretion and denied defendants due process of law.

New York, Mr. Bruckmann. As soon as the Court directed him to seek the policies from the brokers in London, he undertook to do so, and went to London himself. He there found that the volume of the material, of which he had been ignorant, rendered this impossible. He then offered to produce defendants' records at the places where they were kept. When the Court insisted that he obtain the policies from the brokers, he had letters sent to them requesting their files. They, however, answered that it was impossible for them to produce what was sought.

Mr. Bruckmann did not exhibit the slightest trace of contumacy or disobedience to the District Court. On the contrary, he did his best to comply with an impossible requirement. His failure to produce the brokers' files in Pittsburgh was in no way wilful, as the District Court recognized by not making any finding to that effect. The sanction order thus lacked a fundamental prerequisite for its support.

C. THE SANCTION VIOLATED TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

Inasmuch as the sanction imposed in the case at bar was to subject non-resident defendants to the jurisdiction of a court foreign to them, the propriety of the sanction and the order upon which it was based should be judged according to notions of fairness which underly the concept of personal jurisdiction. Does maintenance of the suit in Pennsylvania "offend 'traditional notions of fair play and substantial justice' "? *International Shoe Co. v. Washington, supra* (p. 12), 326 U.S. at 316, quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

When the record is viewed against this standard, the conclusion is inescapable that the District Court's actions in first ordering the defendants to produce volumi-

CONCLUSION

The order of the Court of Appeals remanding the case for further proceedings in accordance with the majority opinion should be modified to provide that the discovery and sanction orders be vacated and that the remand be with a direction to dismiss the action for want of personal jurisdiction over defendant cross-petitioners, or, in the alternative, for further proceedings in which any records within defendants' possession, custody or control shall be subject to inspection by plaintiff only in London.

Respectfully submitted,

Edmund K. Trent
Reed Smith Shaw & McClay
747 Union Trust Building
P.O. Box 2009
Pittsburgh, Pennsylvania
15230
412-288-3144

Counsel of record for cross-petitioners

Of counsel

Thomas P. Lawton III
Kenneth K. Kilbert

Respondent's
Brief

Office Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-440

In the
Supreme Court of the United States

October Term, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief for Cross-Respondent

CLOYD R. MELLOTT
600 Grant Street, 42nd Floor
Pittsburgh, PA 15219
(412) 566-6000
Counsel of Record
for Cross-respondent

Of counsel:

DALE HERSHEY
ROBERT W. DOTY
ROBERT L. BYER
JORDAN S. WELTMAN
ECKERT, SEAMANS, CHERIN & MELLOTT

QUESTIONS PRESENTED FOR REVIEW

This Court's order of November 2, 1981 limited the grant of the Cross-Petition for Writ of Certiorari "to Question I presented by the petition." We respectfully suggest that cross-petitioners in their brief change the substance of Question I presented by the cross-petition and that they raise in their brief questions in addition to the limited question upon which this Court granted the cross-petition, in disregard of Rule 23.1(a) of this Court.[1]

The questions presented for review in this case are as follows:

> When certain defendants, in a motion for summary judgment and affidavits filed in support of that motion, seek dismissal for lack of in personam jurisdiction on the ground that their contact with the jurisdiction, and particularly the amount of business they do in the jurisdiction, is insubstantial; and when those defendants are repeatedly ordered to produce information regarding their contacts

---

[1] The question on which the writ was granted was whether the cross-petitioners were denied due process by the district court's imposition on them of "a sanction finding them subject to personal jurisdiction for failure to produce extremely voluminous records" in Pittsburgh, "when (a) the non-residents had offered to produce them at their home offices abroad, (b) the records would not have shown that they had conducted any activities within the forum state, and (c) the court made no finding that the non-resident defendants' conduct was wilful, contumacious or in bad faith or that they were able to bring the records to the district."

The cross-petitioners now add to this (1) the question of whether, prior to finding personal jurisdiction, the district court could order them to produce any information; (2) the question of whether the district court could order discovery and impose sanctions "in the absence of a prima facie showing by plaintiff of evidence to support a finding of personal jurisdiction," thus wrongly implying that the plaintiff made no such prima facie showing; and (3) the question of whether the order for production and sanctions are proper "when the documents are not in defendant's possession, custody or control." *None of these additional questions was raised below.*

and business in the jurisdiction but fail to do so after repeatedly promising to do so; and when those defendants, by this and other means, unduly prolong and complicate the litigation, causing the district court, after due warning, to impose a sanction under F.R.Civ.P. 37(b)(2)(A) consisting of a finding that the contacts and business of the defendants in the jurisdiction are sufficient to support in personam jurisdiction,

1. Did the district court abuse its discretion?

   (Answer, No.)

2. Did the district court deny the defendants due process?

   (Answer, No.)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

STATEMENT OF CORPORATE AFFILIATIONS ... viii

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

RULE OF CIVIL PROCEDURE INVOLVED......... 2

STATEMENT OF THE CASE 3

Nature of Proceedings 3

The Discovery Sanction 8

Evidence of Personal Jurisdiction 19

SUMMARY OF ARGUMENT 24

ARGUMENT 25

The District Court Properly Took as Established the Facts Necessary to Sustain Personal Jurisdiction as a Sanction under F.R.Civ.P. 37(b)(2)(A) for Cross-Petitioners' Repeated Failure to Obey Orders Directing Them to Produce Information Relevant to Personal Jurisdiction 25

1. The District Court Did Not Abuse Its Discretion in Imposing the Discovery Sanction....................................26

2. Cross-Petitioners Have Waived Their Due Process Claim...............................36

3. Cross-Petitioners Have Received Due Process of Law..............................37

CONCLUSION 43

TABLE OF AUTHORITIES

Page

CASES

ACF Industries, Inc. v. EEOC, 439 U.S. 1081 (1979) (Powell, J. dissenting) 25

Affanato v. Merrill Bros., 547 F.2d 138 (1st Cir. 1977) 29, 33

Anderson v. Air West, Inc., 542 F.2d 1090 (9th Cir. 1976) 41

Antico v. Honda of Camden, 85 F.R.D. 34 (E.D. Pa. 1979) 37

Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979) 29, 33, 34, 35

Compagnie des Bauxites de Guinee v. Insurance Company of North America, 651 F.2d 877 (3d Cir. 1981) 1, 4, 5, 12, 19 23, 26, 38

Davis v. Romney, 53 F.R.D. 247 (E.D. Pa. 1971) 37

Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977) 35

Diapulse Corp. of America v. Curtis Publishing Co., 374 F.2d 442 (2d Cir. 1967) 37

Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613 (5th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978) 37

Duignan v. United States, 274 U.S. 195 (1927) 36

English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), *cert. denied,* 444 U.S. 823 (1979) 27, 41

Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3864 (1981) 37, 38, 39, 40

Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) 34

G-K Properties v. Redevelopment Agency, 577 F.2d 645 (9th Cir. 1978) 35

Hagans v. Lavine, 415 U.S. 528 (1974) 37

Page

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) 42
Henry v. Geopresco International, Ltd., [1976] Q.B. 726, [1975] 2 All E.R. 702....................41
Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J. concurring) 25
International Shoe Co. v. Washington, 326 U.S. 310 (1945) 38
Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass 1976)....................................32
Land v. Dollar, 330 U.S. 731 (1947)................ 26, 27
Lekkas v. Liberian M/V Caledonia, 443 F.2d 10 (4th Cir. 1971) 27
Link v. Wabash R. Co., 370 U.S. 626 (1962) 34
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)..... 27, 29, 33 34, 35
Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976) 37
Societe Internationale v. Rogers, 357 U.S. 197 (1958)....33
United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980) 29
United States v. United Mine Workers, 330 U.S. 258 (1947) 26
Yakus v. United States, 321 U.S. 414 (1944)............36

STATUTES

28 U.S.C. § 1254 (1) 2
28 U.S.C. § 1292 (a)(1) 1, 19

COURT RULES

F.R.Civ.P. 12(b)(2) 8
F.R.Civ.P. 12(h)(1) 41
F.R.Civ.P. 34(b).....................................37
F.R.Civ.P. 37(a).....................................35
F.R.Civ.P. 37(b)(2) ....ii, 2, 33, 35

Page

F.R.Civ.P. 37(b)(2)(A) 3, 14, 24, 25, 26, 27, 34

F.R.Civ.P. 56 20

Amendments to Federal Rules of Civil Procedure, 446 U.S. 997 (1980) 2, 25

Supreme Court Rule 23.1(a) i

Supreme Court Rule 28.1 viii

OTHER AUTHORITY

ABA, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159 (1976) 26

ABA, Section of Litigation, *Report of the Special Committee for the Study of Discovery Abuse* (1977) 32

ABA, Section of Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse* (1980) 25

Bell, *The Pound Conference Follow-Up: A Response From the United States Department of Justice*, 76 F.R.D. 320 (1978) 26

Burger, *Annual Report on the State of the Judiciary-1980*, 66 A.B.A.J. 295 (1980) 25

J. Ebersole and B. Burke, *Discovery Problems in Civil Cases* (Federal Judicial Center, 1980) 25

C. Ellington, *A Study of Sanctions for Discovery Abuse* (U.S. Dept. of Justice, 1979) 26

Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1978) 26, 32

Note, *The Emerging Deterence Orientation in the Imposition of Discovery Sanctions*, 91 Harv.L.Rev. 1033 (1978) 25, 35

Note of Advisory Committee to 1970 Amendment to F.R.Civ.P. 37(b) 33

Note of Advisory Committee to 1980 Amendment to F.R.Civ.P. 34(b) 32

Page

Petition for a Writ of Certiorari, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1979) 33

Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal.L.Rev. 264 (1979) 25, 35

Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958) 36, 40

11 Wright & Miller, *Federal Practice and Procedure*, Civil § 2949 (1973) 20

STATEMENT OF CORPORATE AFFILIATIONS

Cross-respondent Compagnie des Bauxites de Guinee makes the following disclosures of corporate affiliation in compliance with Rule 28.1 of this Court.

Compagnie des Bauxites de Guinee is a Delaware corporation. Fifty-one percent of the shares of the corporation are owned by Halco (Mining) Inc.; 49% of the shares of the corporation are owned by the Republic of Guinea. Halco (Mining) Inc. is a Delaware corporation, the shares of which are owned by the following domestic and foreign corporations in the following percentages:

Company	Ownership Share
Aluminum Company of America	27%
Alcan Aluminum Ltd.	27%
Martin Marietta Aluminum	20%
Vereinigte Aluminiumwerke	10%
Pechiney Ugine Kuhlmann	10%
Montedison	6%

OPINIONS AND JUDGMENTS BELOW

There is no reported opinion of the district court. The district court imposed the discovery sanction at issue at the same time as it granted a preliminary injunction pendente lite. J.A. Vol. I, 195a-205a. The district court filed findings of fact and conclusions of law when it granted preliminary and permanent injunctions pendente lite against cross-petitioners, and some of those findings and conclusions concern the discovery sanction and the finding of in personam jurisdiction. J.A. Vol. I, 195a-202a; Vol. II, 342a-357a.

The opinion of the court of appeals (J.A. Vol. II, 363a-390a) is reported at 651 F.2d 877. The judgment entered in the court of appeals is reproduced in the Joint Appendix. J.A. Vol. II, 391a-393a.

JURISDICTION

This case, which has been pending since 1975, involves review prior to trial and final judgment of a discovery sanction imposed on cross-petitioners. The court of appeals considered and affirmed the propriety of the discovery sanction in connection with an appeal by cross-petitioners under 28 U.S.C. § 1292(a)(1) of an interlocutory order of the district court granting an injunction pendente lite.

The judgment of the court of appeals was entered on June 10, 1981. J.A. Vol. II, 393a. The court of appeals denied rehearing on July 7, 1981. Cross-respondent filed a petition for certiorari on August 11, 1981 requesting review of the decision of the court of appeals to the extent that it reversed the sanction as to three defendants and vacated the injunction (No. 81-290). Cross-petitioners filed a cross-petition for certiorari on August 31, 1981.

This Court granted the cross-petition on November 2, 1981, limited to a review of the propriety of the discovery sanction, as presented in Question I of the cross-petition. This Court to date has not acted on the initial petition for certiorari filed by cross-respondent.

This Court has jurisdiction of this case under 28 U.S.C. § 1254(1).

RULE OF CIVIL PROCEDURE INVOLVED

This case involves the district court's discretion under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure which, at the time of the district court's order imposing the discovery sanction,[2] provided in pertinent part:

> Rule 37. Failure to Make Discovery: Sanctions
>
> ****
>
> (b) Failure to Comply with Order.
>
> ****
>
> (2) Sanctions by Court in which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order....

---

[2] On April 29, 1980, after the discovery sanction was entered in this case, this Court entered an order adopting amendments to the discovery provisions of the Rules of Civil Procedure, 446 U.S. 997, including Rule 37. Id. at 1009. The only changes made to the above-quoted provisions of Rule 37 were the addition of the phrase "or cooperate in" prior to the word "discovery" in the title to Rule 37; and the addition of the phrase "or if a party fails to obey an order entered under Rule 26(f)," after the reference to Rule 35 in paragraph (b)(2).

STATEMENT OF THE CASE[3]

Nature of Proceedings

This case demonstrates how litigation involving a $20,000,000 insurance claim can be stalled by certain defendants using a series of procedural delaying tactics coupled with repeated failure to comply with discovery obligations. After cross-petitioners' delaying tactics and failure to comply with orders compelling the production of documents resulted in years of delay, with the question of personal jurisdiction still unresolved, the district court, at a point of exasperation, ordered cross-petitioners to produce information relevant to personal jurisdiction, which cross-petitioners had previously informed the district court they would produce. The district court warned cross-petitioners that further failure to comply would result in a sanction under F.R.Civ.P. 37(b)(2)(A). The sanction would consist of the district court taking as established the fact that cross-petitioners did sufficient business in the Commonwealth of Pennsylvania to provide a basis for personal jurisdiction. The cross-petitioners failed to produce the information by the deadline set by the district court, and failed to do so even after the deadline expired. The district court, faced with the continued disregard of its orders, and in the context of cross-petitioners' other delaying tactics, imposed the threatened sanction, which was affirmed by the court of appeals. Cross-petitioners now challenge the sanction in this Court on the basis of constitutional claims and factual allegations which they did not raise in the district court and on the basis of arguments which go beyond the limited question on which this Court granted the cross-petition for certiorari.

---

[3] This section of the brief will describe not only the background for the argument but the events which led the district court to enter sanctions against the cross-petitioners and the evidence of in personam jurisdiction which cross-respondent presented to the district court. This section is, therefore, a fundamental part of cross-respondent's submission to this Court.

Cross-respondent Compagnie des Bauxites de Guinee[4] filed suit in the United States District Court for the Western District of Pennsylvania on December 11, 1975. As set forth in CBG's complaint (J.A. Vol. I, 8a), the suit involves the liability of defendant insurance carriers, some of whom are the cross-petitioners here,[5] for business interruption losses pursuant to contracts of insurance made by the defendants with CBG.

The incident which gave rise to the business interruption losses occurred in 1974. As noted by the court of appeals in its opinion, 651 F.2d 877, 880 (J.A. Vol. II, 363a-364a), and as is supported by a review of the record, resolution of this case on the merits has been delayed now for over six years by a series of procedural impediments interposed by the excess insurers, who admit that they have undertaken no investigation of the merits of CBG's insurance claim.[6] They appear to have adopted a strategy of harassment and delay, which they have implemented in good part by a refusal to comply with legitimate discovery requests, even when compliance was ordered by the district court, by the filing of a series of groundless motions[7] and by the belated filing of litigation against CBG in

---

[4] Hereinafter "CBG."

[5] Cross-petitioners here are not all of the defendants in the case. Because the cross-petitioners are insurers of an excess layer of coverage (losses in excess of $10,000,000, not to exceed $20,000,000), they have been referred to as the "excess insurers," and shall be so called hereafter in this brief. In addition, not all of the excess layer insurers are cross-petitioners here. Four insurers did not contest personal jurisdiction in the district court. J.A. Vol. I, 105a, 181a. Three others were dismissed from the case by the court of appeals. J.A. Vol. II, 378a.

[6] Transcript of permanent injunction hearing, November 5-7, 1979, p. 248.

[7] In addition to the summary judgment motion, the excess insurers filed the following motions and appeals, one at a time:

(a) A motion challenging CBG's capacity to sue, on the ground that CBG was doing business in Pennsylvania without having registered (J.A. Vol. I, 120a) (though the excess insurers were otherwise taking the position that CBG was a totally foreign corporation, that

Continued

London raising the same claims they had already interposed as defenses in the action pending before the district court. J.A. Vol. II, 353a-356a. It was in the face of this strategy that the district court imposed the discovery sanction in question, after first warning the excess insurers that such a sanction would be

---

CBG was not doing business in Pennsylvania and that Pennsylvania had no interest in the litigation. J.A. Vol. I, 37a);

(b) An appeal from the denial of the foregoing motion. The appeal was dismissed because the court of appeals clearly lacked jurisdiction over the interlocutory matter. 651 F.2d at 879, n.1; J.A. Vol. II, 364a, n.1;

(c) A motion challenging the diversity between the plaintiff and defendant Insurance Company of North America. INA did not join in the motion. CBG is a Delaware corporation doing business in Guinea. INA is a Pennsylvania corporation with its principal place of business in Pennsylvania. J.A. Vol. II, 342a, 343a, 350a-351a;

(d) A motion to amend their answer to add the already rejected defense of lack of capacity. The motion was denied. District court docket entries, p. 4A, No. 146, June 11, 1979 (The motion incorrectly identifies itself as a motion to amend the "complaint.");

(e) A motion to dismiss for lack of venue, which they withdrew when it was pointed out that venue is clearly proper. District court docket entries, p. 6, No. 203, Nov. 5, 1979 and No. 211, Nov. 29, 1979;

(f) A motion that the trial judge recuse himself, not for bias but because the law firm representing CBG had hired one of the judge's law clerks after she left the service of the judge. The court of appeals refused to hear an appeal from the denial of the motion. See district court docket entries, p. 7, Aug. 6, 1980 and Sept. 10, 1980;

(g) An appeal from the preliminary injunction against the excess insurers directing them to desist from further prosecuting the duplicative action which they filed in London against CBG. They later withdrew the appeal. District court docket entries, p. 4, No. 128, April 23, 1979; p. 5A, Aug. 2, 1979;

(h) Two motions to dismiss on the ground of forum non conveniens, one submitted as part of the summary judgment motion, which was denied, and one raising the same issue again. The district court again denied the motion. J.A. Vol. I, 31a; Vol. II, 350a; district court docket entries, p. 6, No. 187, Oct. 22, 1979; p. 7, No. 238, Aug. 5, 1980.

Though the excess insurers were unsuccessful on all of these motions and interlocutory appeals, they did achieve delay. Their tactics also consumed valuable judicial time and caused great expense to CBG.

imposed if the district court's order were again flouted (J.A. Vol. I, 115a, 116a, 119a), and issued the preliminary injunction against prosecution of the London action.

The facts necessary to a determination of the questions presented are the subject of findings made by the district court. J.A. Vol. I, 195a-204a; Vol. II, 342a-357a. The court of appeals did not disturb any of the district court's findings of fact. The material facts can be summarized as follows.

CBG is a Delaware corporation which operates a bauxite mine, railway and processing plant in the Republic of Guinea, West Africa. J.A. Vol. II, 342a, 346a. In 1973, Halco (Mining) Inc. (hereinafter "Halco"), a Delaware corporation with offices in Pittsburgh, Pennsylvania and the major shareholder of CBG, instructed the insurance brokerage firm of Marsh & McLennan to obtain for CBG business interruption insurance in the amount of $20 million covering CBG's operations in Guinea. J.A. Vol. II, 342a, 347a. Marsh & McLennan obtained for CBG a policy of business interruption insurance from defendant Insurance Company of North America (hereinafter "INA"), a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania, providing the first layer of coverage in the amount of $10 million. J.A. Vol. II, 343a, 349a. That policy was issued in Philadelphia and delivered to CBG in Pittsburgh, Pennsylvania. J.A. Vol. II, 349a.

The excess layer of coverage was arranged through a London broker, Bland Welch & Co., Ltd., dealing with Marsh & McLennan in Pittsburgh. (Bland Welch & Co., Ltd. later became "Bland Payne" and is so called hereinafter). Bland Payne arranged coverage by twenty-two excess insurance carriers in the amount of $10 million in excess of the $10 million coverage provided by INA. J.A. Vol. II, 346a, 347a-348a.[8]

---

[8] After suit was filed, one of the insurers, Mercantile & General Reinsurance Co. Ltd., withdrew from the coverage, its share of the liability being taken over by defendant Insurance Corporation of Ireland. J.A. Vol. II, 345a. Hence there now are only 21 excess insurer defendants.

The excess insurers did not issue or execute a formal policy. J.A. Vol. II, 349a. Rather, they executed a "placing slip" which indicated the share of coverage underwritten by each excess insurer and which adopted the form of the INA policy "as far as applicable." J.A. Vol. II, 347a, 349a; DX-1 (J.G.-1), J.A. Vol. II, 280a-281a, Vol. III, 529a.[9] Bland Payne then issued in London and sent to Marsh & McLennan in Pittsburgh a "cover note" evidencing the coverage. J.A. Vol. II, 347a-348a; J.A. Vol. III, 423a. Marsh & McLennan delivered the cover note to Halco. J.A. Vol. II, 347a. Marsh & McLennan also, acting on behalf of the excess insurers, collected the premium in Pittsburgh, transmitted the premium to Bland Payne in London after deducting its commission, and Bland Payne, after deducting the commission which the insurers had agreed upon, deposited the premium in accounts which Bland Payne maintains for the insurers. J.A. Vol. I, 45a-46a, 51a.

After the INA policy and excess insurance coverage took effect, CBG sustained losses from interruption to its business as the result of failures of the pan feeders and crusherhouse at its processing plant at Kamsar, Guinea. J.A. Vol. I, 9a, ¶ 7. The insurers refused to honor CBG's claim, and CBG filed suit against INA and the excess insurers in Pittsburgh. Bland Payne, the London broker, retained an American law firm to represent the excess insurers. J.A. Vol. II, 287a-288a.

Count I of CBG's complaint states a claim against INA on its primary business interruption policy. Count II states a claim against the excess insurers based upon their agreement to provide $10 million coverage in excess of that provided under the INA policy.[10]

---

[9] The district court found that the excess insurers "agreed to provide coverage on the same terms and conditions as the underlying INA policy, except that their coverage would be for each loss of $10,000,000, in excess of the underlying $10,000,000 covered by INA." J.A. Vol. II, 349a, ¶35.

[10] Although the excess insurers assert in footnote 7 on page 4 of their brief that CBG did not plead a contract with them, they admitted in their

Continued

The excess insurers did not raise their challenge to personal jurisdiction by way of a preliminary motion under F.R.Civ.P. 12(b)(2). Rather, they filed an answer and a subsequent amended answer on the merits.[11] The original answer denied that there was personal jurisdiction, and the amended answer raised the alleged lack of personal jurisdiction as an affirmative defense.

The excess carriers did not press promptly their challenge to personal jurisdiction. From the beginning, they participated in pre-trial conferences, filed pre-trial motions and participated in discovery on the merits, without suggesting that their challenge to personal jurisdiction was anything more than pro forma. On May 20, 1977, approximately seventeen months after the filing and service of the complaint, the excess insurers filed a motion for summary judgment, with affidavits, in which they sought dismissal for lack of personal jurisdiction. J.A. Vol. I, 31a.[12]

The Discovery Sanction

Among the issues on which CBG has the burden of proof are the court's jurisdiction over the defendants and the terms of

---

answer that they agreed to the "Cover Note" pleaded by CBG as the contract. J.A. Vol. I, 15a, ¶16. Throughout their answer they acknowledged the cover note to be the contract.

[11] Included among the other defenses raised by the excess insurers on the merits were the contentions (a) that notice of loss was not given and that a sworn proof of loss was not submitted within the time required; (b) that the loss was not within the scope of coverage; (c) that suit was not filed within the time required; (d) that the district court lacked subject matter jurisdiction; (e) that the primary damage occurred before the effective date of coverage; (f) that CBG allegedly did not disclose prior damage to the property in question; and (g) the damage suffered was expressly excluded from the coverage. J.A. Vol. II, 349a-350a, ¶36. See also note 43 on page 41, below.

[12] The motion also sought dismissal for forum non conveniens. The cross-petition sought review of the court of appeals holding that the denial of the forum non conveniens contention was not appealable at this stage of the proceedings. That question is not before this Court, because of the limited grant of certiorari. Review of this interlocutory question would not now be proper.

the insurance contracts with INA and the excess insurers. On the latter point, the INA contract is in the form of a written policy, but the contract with the excess insurers, insofar as it is in writing, is expressed only in outline form in the placing slip and cover note. CBG therefore, on August 9, 1976, served interrogatories and requests for documents to discover from the excess insurers, inter alia, facts about the typical forms which they used when they executed complete policies for business interruption insurance. J.A. Vol. I, 22a-25a. These forms, of which there are not many, were eventually produced in London in June and July 1979 (three years after they were requested) and were not involved in the sanctions question.[13]

The request which did lead to the issuance of sanctions was CBG's second request for production of documents, filed on July 14, 1978, which sought evidence regarding the extent of business done by the excess insurers in Pennsylvania. J.A. Vol. I, 67a. The seventeen excess insurers which moved for summary judgment on the ground of lack of in personam jurisdiction had denied in that motion and affidavits filed with it that they had any business, property or agents in Pennsylvania. J.A. Vol. I, 31a-40a. In response, on April 7, 1978, CBG filed affidavits showing that they had used a Pittsburgh insurance broker to deliver policies and collect premiums, that they had written other coverage in Pennsylvania, and that the particular business interruption coverage on which suit was brought was negotiated through a Pittsburgh broker, was paid for in Pittsburgh, and was evidenced to the insured by delivery of a cover note in Pittsburgh.[14] CBG also filed its second request for documents, seeking production of insurance contracts involving the excess insurers which were tied to Pennsylvania.[15]

---

[13] The excess insurers objected to the document requests. J.A. Vol. I, 26a-28a. CBG moved to compel responses (J.A. Vol. I, 29a-30a), and the district court ordered production. J.A. Vol. I, 65a-67a. Pursuant to a later protective order (J.A. Vol. I, 210a-213a), the documents were produced before depositions of excess insurer underwriters were taken in London. This production in London reflects CBG's willingness to have production take place in London when the documents being produced are those actually requested. These circumstances should be distinguished from those which led to the sanction, where, after long delay, an offer was made to produce in London and elsewhere files which may or may not have contained the information requested. See pp. 12-13, 30-32, below.

The excess insurers objected to CBG's request. J.A. Vol. I, 68a-69a. They did not do so, however, on the grounds that it would be burdensome to require production in Pittsburgh rather than London, or that the documents were in the custody of London brokers over whom they had no control. They objected on the ground that certain of the policies were already in plaintiff's possession, that as to some policies they would need more information for purposes of identification and that the request was too broad.

The plaintiff's need for the documents and the excess insurers' objections to producing them were discussed in proceedings on July 27, 1978, which had been scheduled as an argument on the summary judgment motion. J.A. Vol. I, 65a. The excess insurers, in their argument and in affidavits which they filed on that day, placed heavy emphasis on the quantum of business which they were doing in Pennsylvania. Twelve of the moving excess insurers filed affidavits saying that they cover risks on a world-wide basis (J.A. Vol. I, 75a), that they had reviewed their records, and that they were able to state numbers of risks located in Pennsylvania and proportions of premium income allocable to those risks and were able to make other statements quantifying their Pennsylvania, United States or North America business. J.A. Vol. I, 77a-81a.

---

[14] Affidavits of Milton Beadling (J.A. Vol. I, 49a-54a), Dale Hershey (J.A. Vol. I, 56a-61a) and William Witney (J.A. Vol. I, 62a-65a).

[15] The request sought "all cover notes and/or insurance policies wherein any of the excess insurer defendants participated as an insurer and which cover notes and/or insurance policies were delivered in the Commonwealth of Pennsylvania and/or covered a risk located in the Commonwealth of Pennsylvania." J.A. Vol. I, 68a.

The district court, at CBG's request, ordered the excess insurers to produce "copies of all the policies they have written for assureds in Pennsylvania or covering risks in Pennsylvania or for brokers in Pennsylvania." J.A. Vol. I, 92a. Counsel for the excess insurers agreed to the production, in exchange for documents they sought from CBG, but argued that production by the excess insurers of their policies connected with Pennsylvania would be burdensome without a "restriction as to time." J.A. Vol. I, 93a. The court then limited the period covered by the production to that between 1971 and the date of the hearing and further allowed the excess insurers to "furnish the names of the policies and the numbers and sort of a general outline of the policies, not in detail." J.A. Vol. I, 93a.[16] When another counsel for the excess insurers stated that the insurers did not retain copies of the policies and that the policies would be available in the files of London brokers, the court suggested that the excess insurers send form letters to the brokers requesting the necessary documents. J.A. Vol. I, 94a.[17] The court asked the excess insurers' counsel how much time would be needed to gather the information, and counsel requested 90 days with the opportunity of obtaining an extension if necessary. Counsel's request was granted. J.A. Vol. I, 95a-96a.

---

[16] While the district court found that CBG's request was not burdensome (J.A. Vol. I, 95a), it did all it could to make the excess insurers' task manageable. Though CBG had specifically asked for documents—cover notes and insurance policies—which would show business in Pennsylvania, the court permitted the defendants, if they chose, merely to outline and list the policies. Furthermore, since the insurers retained copies of placing slips showing coverage which they underwrote, it was understood that these might be produced instead of policies or cover notes. J.A. Vol. I, 113a. Essentially, the insurers were asked to produce *information*, from their own records or records over which they had control, showing the extent of their underwriting of risks located in Pennsylvania, their underwriting for Pennsylvania insureds and their underwriting through Pennsylvania brokers.

[17] The excess insurers did not argue that the fact that the policies were in the hands of the brokers placed them beyond the control of the defendants. They argued only that it would be burdensome to have a search made through the records of 150 brokers. J.A. Vol. I, 94a. In fact, as shown by the responses of the brokers, the defendants can get the policies from the brokers if they give enough detail and advance notice. See pp. 16, 17, below. That detail and advance notice could have been given in the form letter suggested by the court.

At the end of the 90 days the excess insurers produced no policies or other information regarding the extent of their business in Pennsylvania. Instead they sought an extension of time, representing that they would "probably be able to complete the [production] within thirty days" (J.A. Vol. I, 97a).[18] On November 8, 1978, the court granted them the additional 30 days. J.A. Vol. I, 98a.

On November 24, 1978, the last day of the extended time period, the excess insurers produced no documents or other information regarding their business in Pennsylvania. Instead they filed an affidavit representing that certain of them would make 4,000,000 files available at their 15 different home offices in London, Gloucester, Brussels and Tel Aviv (J.A. Vol. III, 428a-429a) and that CBG might inspect such files to "confirm each excess insurer's affidavit regarding the number of insured risks geographically within Pennsylvania." J.A. Vol. I, 99a.

The motion for an extension of time and the affidavit filed by the excess insurers in lieu of producing documents shows their disregard for the court and their lack of good faith in responding to discovery orders. They requested 90 days to produce documents, and then said that in an additional 30 days they could complete their response, but at the end of the extended time they produced only an affidavit inviting CBG to review 4,000,000 files at 15 scattered locations to determine whether they contained the documents desired. On the one hand they implied that the extent of their business connected with Pennsylvania is impossible to determine without search-ing through 4,000,000 files, and yet on the other hand they represented in their own affidavits that they had reviewed their records and stated that they either have done no business in Pennsylvania or that the extent of their Pennsylvania business was of a minimal specific quantity.[19] Thus, while representing that the determination of their Pennsylvania connected business had not been undertaken and would require the examination of 4,000,000 files, they asked the court and the plaintiff to accept without challenge their statistics regarding the extent of their Pennsylvania business, which statistics they obviously gathered after a review of the records which the court had ordered them to produce.[20] It also is important to note that the affidavit filed on November 24, 1978 does not state that the documents to be produced are in the hands of London brokers or outside the excess insurers' control.

---

[18] Though the motion speaks of answers to interrogatories, it undeniably means to deal with the production of documents. See opinion of court of appeals. 651 F.2d at 882, n.4; J.A. Vol. II, 369a, n.4. This careless mistake indicates that the excess insurers were not taking their obligation to produce very seriously.

On November 27, 1978 CBG filed a motion to compel the excess insurers to produce the documents, requested on July 14 and covered by the district court's order of July 27, relating to coverage provided by any of the excess insurers to insureds located in Pennsylvania or on risks located in Pennsylvania or through brokers located in Pennsylvania, which would "demonstrate that the Excess Insurer Defendants have deliberately engaged in a consistent course of business in Pennsylvania and are therefore subject to the *in personam* jurisdiction of Pennsylvania courts under the Pennsylvania long arm statute which was in effect when this action was commenced." J.A. Vol. I, 100a. The court held a hearing on the motion on December 21, 1978. At that hearing, counsel for the excess insurers said that his clients "have already admitted that a certain percentage of the business comes from Pennsylvania" and questioned whether it would "make any difference if it's one or two per cent." J.A. Vol. I, 113a. CBG, however, in light of the defendants' argument that one or two percent was not enough, insisted upon its right to the production of documents which would show the full extent of the excess insurers' Pennsylvania business. The court ordered the production of the documents and warned that sanctions would be imposed, saying the following:

---

[19] For example, defendant Consolidated Reinsurance Co. Ltd. represented in an affidavit filed on July 17, 1978 that it "has reviewed its records for [some unspecified period] and determined only that 6 risks involving premium income are specifically identifiable as being located in Pennsylvania and such represent 0.02% of the gross premium income received through defendant's London office." J.A. Vol. I, 81a. Eleven defendants made similar representations in affidavits filed on the same day.

[20] The excess insurers offered the files so that the plaintiff could "confirm each excess insurer's affidavit regarding the number of risks geographically within Pennsylvania." J.A. Vol. I, p. 99a. Either the affidavits are based upon a review of the requested information or they are totally unreliable in their representations as to Pennsylvania business.

> I don't want to be unduly harsh, but you have, I don't think, made a conscientious effort to get this information up to this point.
>
> Let me tell you something: for you to know that the percentage was that you are reciting, you would have had to have done this already.
>
> * * *
>
> All right, I will tell you what I am going to do. I am going to give you 60 days to get this information to Mr. Mellott, as you had promised. See, you promised to go ahead and do this. And if you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume under Rule of Civil Procedure 37(b), subsection 2(A), that there is jurisdiction. That's what I am going to do.
>
> * * *
>
> Now, that means I am giving you almost a year to get this together.

J.A. Vol. I, 115a.

Because of the arguments now being made by the excess insurers, it should be noted just what the district court ordered them to do. It ordered them to produce the information requested within sixty days. The court repeated its statement that the defendants should produce "the names of the policies and the numbers and sort of a general outline of the policies, not in detail," showing the extent of Pennsylvania-related business. J.A. Vol. I, 117a. It did not specify where that production was to take place. It did not order the excess insurers to obtain documents from London brokers.

Instead of undertaking a review of their files, using indexes which they acknowledged having (J.A. Vol. I, 106a, 115a), the excess insurers threw the whole burden of locating policies upon London brokers, who are not parties to the case.[21] In January 1979, almost six months after the excess insurers first stated that the brokers would have to be contacted (J.A. Vol. I, 94a), they wrote to the brokers asking for policies. J.A. Vol. III, 430a-431a. They gave the brokers less than one month to come up with the documents.

On February 19 and 20, 1979, at the close of the sixty-day period established by the court, the excess insurers produced hundreds of unresponsive documents. Only a few of the documents were policies of the kind which the court had ordered them to produce. Supplemental productions were made on March 20 and March 22, 1979, but these documents too were inadequate and unresponsive. The documents produced by the excess insurers consist almost exclusively of reply letters received by the excess insurers from brokers stating that, in the time allowed and with no guidance as to what policy numbers were being requested, they could not comply with the request for policies. The brokers' responses are analyzed in Plaintiff's Exhibit 5 (J.A. Vol. III, 487a-496a), on which the district court relied in entering its sanction. J.A. Vol. I, 193a-194a, 199a. We refer the Court to that exhibit for a full analysis, but we summarize here certain important points to show the inadequacy and bad faith of the response to the request for documents.

---

[21] The excess insurers counsel stated that the insurance contracts covering Pennsylvania insureds or Pennsylvania risks are summarized in indexes maintained by the defendants. J.A. Vol. I, 106a-107a. He stated that the defendants maintained no indexes which would show whether a Pennsylvania broker was involved as an intermediary in an underwriting. J.A. Vol. I, 107a. However, the defendants' files contain copies of placing slips (J.A. Vol. II, 265a-266a), and the placing slips identify the producing brokers and their locations. J.A. Vol. I, 107a, 111a-112a. It was not necessary for the defendants to get information from the London brokers. The defendants' half-hearted attempt to get documents from the brokers was a boondoggle, designed to produce a large supply of meaningless responses.

First, the excess insurers waited an unconscionably long time to attempt to procure documents from the brokers. They first agreed on July 27, 1978 to supply the documents, and they were advised on that date by the court that they might attempt to get documents by sending form letters to the brokers with whom they had dealt. J.A. Vol. I, 94a. It is clear from the documents produced that the excess insurers did not send form letters to the brokers until January 1979. J.A. Vol. III, 430a-431a. They gave the brokers less than one month to gather the documents for them. They offered the brokers no financial assistance, no staff assistance, no policy numbers to guide them in their search, and no other support. The inadequate results could only have been expected.

Second, the excess insurers produced none of their own records, consisting of indexes and placing slips, which they had previously reviewed to obtain the statistics included in their affidavits on the extent of their Pennsylvania business. J.A. Vol. I, 115a. See pp. 10, 12-13, 14, above.

Third, to the extent that responsive documents were produced, the production shows extensive business being done by the excess insurers in Pennsylvania. The Insurance Corporation of Ireland produced ten insurance contracts, six of them showing coverage provided by The Insurance Corporation of

Ireland for Pennsylvania Power & Light Company. J.A. Vol. III, 492a. Eagle Star Insurance Company collected $797,515.82 in premium income for business written in Pennsylvania in the years 1972 through 1977. J.A. Vol. III, 493a. In 1975, the year in which this action was brought, Eagle Star collected $108,255 in premiums from its Pennsylvania business. J.A. Vol. III, 493a. Other defendants which produced some insurance policies showing business connected with Pennsylvania were Turegum, Excess, English & American, and Consolidated European. J.A. Vol. III, 493a-495a.

Fourth, the replies of the brokers, all of which were in evidence before the district court (J.A. Vol. I, 156a-157a), frequently indicate that they could have complied with the excess insurers' requests for policies if they had been given more time and more information.[22]

Fifth, the brokers did not regard themselves as agents of the insured and therefore as being precluded from supplying the policies or information requested by the insurers. The brokers did not refuse to produce the policies for the insurers on the basis of some agency agreement with the insureds. They regarded the policies in their custody as being available to the insurers, if only the insurers would give sufficient time and sufficient specificity as to which policies should be pulled.

---

[22] For example, C. T. Bowring & Co. wrote that "it would literally take months to obtain the information you require." J.A. Vol. III, 432a. H. Clarkson (North America) Limited wrote on January 23, 1979, that the production "could not be completed in the time allowed." Stenhouse Reed Shaw Group replied, "If you would kindly state our Policies reference number we will immediately issue you with a copy of the Policy." Harris & Dixon (Insurance Brokers) Ltd. asked for "a list of the American risks that you have written to us since 1972" to make the job more manageable. Wigham Poland Limited replied, "with the aid of full relevant information we may be able to provide certain of the documents you need." (We note further that the cross-petitioners, in producing the Joint Appendix, failed to include all of the Brokers' responses or even a representative sampling of them.)

During the months when the excess insurers should have been trying to avoid sanctions by gathering information in response to the court's order, they were instead concocting numerous stratagems to delay the action in the district court and to file a duplicative suit against CBG in London. In February 1979 they were arguing that CBG lacked the capacity to sue in Pennsylvania. In March 1979 they filed the London action.[23] It was clear to CBG, as it must have been clear to the district court, that the excess insurers were using every conceivable device to delay trial on the merits and that they were not responding in good faith to the court's discovery order.

In light of the inadequacy of the excess insurers' response, CBG filed a motion for sanctions on February 23, 1979. J.A. Vol. I, 121a-129a. The motion recites the full background of the defendants' conduct and describes what was produced. As a sanction, CBG, in accordance with the district court's warning of December 21, 1978, sought a finding that the court had in personam jurisdiction over the excess insurers.

On April 12, 1979, one day after CBG's counsel learned of the filing of the London action, CBG moved for an injunction to prevent the excess insurers from further prosecuting that action. J.A. Vol. I, 141a. A hearing was held on this motion on April 18 and 19, 1979. In order for the court to issue the injunction, it first had to find in personam jurisdiction over those enjoined. It found in personam jurisdiction on the basis of the sanction sought in CBG's motion of February 23, 1979 and on the basis of evidence presented at the hearing of April 18-19, 1979. It also entered the injunction against further duplicative proceedings in London. J.A. Vol. I, 195a-205a. The court, at the excess insurers' insistence, described the injunction as preliminary and set a hearing on a permanent injunction at a later date.[24] However, the entry of the sanction was final. The district court determined that, because of the excess insurers' conduct, the issue of in personam jurisdiction was closed for the remainder of the case. J.A. Vol. II, 227a.

---

[23] That action was based upon arguments which the excess insurers later admitted were spurious, waived or both. J.A. Vol. II, 281a-285a, 308a-309a, 317a, 319a-321a; Vol. III, 481a-482a.

The excess insurers sought a stay of the injunction from the district court and the court of appeals, both of which denied the stay. The excess insurers filed an appeal of the preliminary injunction under 28 U.S.C. § 1292(a)(1) but later withdrew the appeal. The final injunction hearing was held on November 5-7, 1979. The district court entered a "permanent" injunction. J.A. Vol. II, 342a-359a. The excess insurers appealed. This Court now reviews the results of that appeal.[25]

Evidence of Personal Jurisdiction

The excess insurers' brief, without analyzing the evidence, wrongly implies that, apart from the discovery sanction, there was no evidentiary demonstration of personal jurisdiction in the district court. Actually, the district court (J.A. Vol. I, 195a-202a) and the court of appeals (651 F.2d at 886, n.9; J.A. Vol. II, 377a, n.9) found the evidence of in personam jurisdiction to be substantial. The evidence connected the excess insurers with the jurisdiction both in the instant transaction and in a series of other transactions.

---

[24] Though the district court adopted the distinction of preliminary and final injunctions, both injunctions were pendente lite. CBG sought and the court granted only injunctions to prevent a duplicative and harassing action from being tried during the pendency of the action which was in the district court.

[25] Through the proceedings regarding pleadings, discovery, summary judgment, sanctions and appeals, the excess insurers have been represented by a series of law firms. This fact has in itself been disruptive and has contributed to delay, because new counsel has tried to revive issues which were decided earlier in the case. At this time, the excess insurers are represented by two Pittsburgh law firms. A third Pittsburgh firm withdrew when a conflict of interest was discovered. The discovery activities which led to the sanctions were conducted by a New York firm which has since withdrawn. A firm of London solicitors has acted for the excess insurers throughout. A London barrister was retained in 1978. The length of the delays which the excess insurers have been able to attain may be a function of the number of counsel involved.

As to the business interruption transaction being sued upon, CBG produced evidence that the excess insurers adopted the underlying policy written by INA in Pennsylvania and delivered to CBG in Pennsylvania. J.A. Vol. I, 159a-161a, 163a; Vol. II, 246a-247a; Vol. III, 529a. The district court so found. J.A. Vol. II, 349a.[26] CBG also produced evidence that the excess insurers were told that they were dealing with a Pennsylvania insured when they entered the insurance contract. They deny being so informed, but they can't remember with whom they dealt or what was said in the conversations leading to their signing the placing slip. J.A. Vol. II, 269a, 272a. A Bland Payne representative was quoted in an affidavit filed by CBG as saying that "when Bland Welch placed the coverage with the excess underwriters, it gave information about CBG," including the information that "the producing broker was the Pittsburgh office of Marsh & McLennan, Inc. and that the Aluminum Company of America is one of the principal owners of CBG." J.A. Vol. I, 55a.[27] A Marsh & McLennan broker stated in his affidavit that his office transmitted to Bland Payne, so that it would be passed on to the insurers, the information that "CBG is a Delaware corporation, the fact that Marsh & McLennan was dealing with CBG in Marsh & McLennan's Pittsburgh office, and the fact that the

---

[26] Having adopted an underlying policy, the excess insurers should anticipate suit in the jurisdiction where the underlying insurer can be sued. Otherwise an insured would be put to the unreasonable burden of proving the same case in various jurisdictions where individual underwriters of a particular risk are amenable to suit.

[27] The excess insurers complained below that CBG's evidence of in personam jurisdiction was presented largely in affidavits and was therefore inadmissible. The affidavits were presented, however, at a hearing on a preliminary injunction and were prepared originally to oppose the excess insurers' summary judgment motion. For preliminary injunction and summary judgment purposes, affidavits are admissible. F.R.Civ.P. 56; 11 Wright & Miller, Federal Practice and Procedure, Civil §2949 (1973).

Aluminum Company of America is a major shareholder in Halco (Mining) Inc., which is a 51% owner of CBG." J.A. Vol. I, 50a. The Bland Payne broker in charge of the placement stated in an affidavit that "information concerning C.B.G. and its relationship with other corporations, to the extent that those relationships were reflected in the Bland Payne placement file, would have been available for underwriters' consideration in the course of negotiating the placement." J.A. Vol. I, 44a. The Bland Payne placement file itself is replete with communications with Marsh & McLennan in Pittsburgh. J.A. Vol. I, 58a-59a. The placing slip, which provides for coverage in U.S. dollars and describes the coverage as business interruption (an American rather than a European term), put the excess insurers on notice of an American connection. J.A. Vol. I, 169a-171a, Vol. III, 529a-530a. The Marsh & McLennan broker stated in his affidavit that his Pittsburgh office acted as agent for the excess insurers in delivering the policy (in the form of a cover note) in Pittsburgh and in collecting the premium, which was paid in Pittsburgh. J.A. Vol. I, 51a.[28] He also stated that had a policy for the excess layer been prepared, he would have expected it to contain a clause in which the excess insurers acceded to the jurisdiction of American courts, just as insurers had done in other policies issued previously to CBG and other American insureds. J.A. Vol. I, 51a-53a. From this ample evidence, the district court found, apart from the sanctions, that it had in personam jurisdiction over all of the excess insurers due to their knowing entry into the jurisdiction in the underwriting being considered. J.A. Vol. I, 199a, 201a-202a.

---

[28] In their brief (p. 29) the excess insurers deny that the brokers were their agents. Yet their witness testified that the insurers relied upon the brokers to collect premiums for them and that the London broker engaged American counsel for them in this case. J.A. Vol. II, 266a-267a, 287a-288a. The London brokers confirmed their role as agent for the insurer in delivering the policy, in collecting the premium, and in holding the premium in accounts maintained for the insurers. J.A. Vol. I, 45a-46a, 56a-57a.

In addition, CBG presented to the district court evidence that certain of the excess insurers had engaged in substantial business in Pennsylvania apart from the instant underwriting. It produced 24 insurance policies and cover notes reflecting coverage written for CBG by various excess insurer defendants between 1972 and 1977. The policies were delivered to CBG in Pittsburgh at the office of Halco (Mining) Inc. which is a part owner of CBG and which acts under contract to procure insurance for CBG. Twenty-one of these policies were delivered to CBG by the Pittsburgh office of Marsh & McLennan. Eighteen of the policies and cover notes are dated prior to the filing of this action. As indicated in the affidavit, the policies contain service of suit clauses in which the excess insurers accede to the jurisdiction of American courts and authorize the Pennsylvania insurance commissioner to accept service of process in their behalf.[29]

In addition to the policies showing previous underwritings for CBG, the plaintiff reminded the district court of the excess insurers' willingness to stipulate that up to 1% of their premium came from Pennsylvania. J.A. Vol. I, 109a, 147a-150a. Four of the excess insurers acknowledged doing business in Pennsylvania and did not challenge the court's in personam jurisdiction. J.A. Vol. I, 105a, 181a. Two others, though they challenged the court's in personam jurisdiction, have acknowledged being registered in Pennsylvania as surplus line carriers. J.A. Vol. I, 181a.[30] Whatever the volume of their Pennsylvania business, all of the excess insurers admitted through their counsel a consistent, repeated entry into Pennsylvania in the conduct of their international insurance business.

---

[29] The policies are described in pertinent detail at J.A. Vol. I, 133a-140a.

[30] The two Pennsylvania surplus line companies are Excess Insurance Co. Ltd. and English & American Insurance Co. Ltd. It is interesting to note that of the 4,000,000 files offered by the excess insurers in response to CBG's request, 3,000,000 to 4,000,000 are files of Excess Insurance Co. Ltd. and 150,000 are files of English & American Insurance Co. Ltd. Each of the other companies has between 20,000 and 60,000 files. J.A. Vol. III, 428a-429a. In an attempt to make the analysis of files and the production of documents appear burdensome, the defendants repeat the 4,000,000 figure, which is inflated by the files of companies over which there is clearly jurisdiction due to their registration in Pennsylvania.

Clearly when the court entered sanctions against the excess insurers finding them to be subject to in personam jurisdiction, not only did it have ample justification in light of the repeated failures to produce documents, but it also had evidence that the excess insurers knowingly had dealt with CBG as a Pennsylvania insured and that all of them were in fact doing business in Pennsylvania, had on previous occasions acceded to jurisdiction in the United States and had authorized service of process through the insurance commissioner. J.A. Vol. I, 199a-202a, Vol. II, 356a-357a. The court of appeals acknowledged the substantial nature of this evidence. 651 F.2d at 886, n.9; J.A. Vol. II, 377a, n.9. The evidence of contact with the jurisdiction applied to all of the excess insurers, including the three companies as to which the court of appeals directed dismissal of the complaint. 651 F.2d at 886; J.A. Vol. II, 378a.[31]

The foregoing statement of the case differs sharply from the inaccurate and misleading statement in the brief of the excess insurers. Their brief not only misstates facts but fails to give the true impression of the excess insurers' delays, spurious arguments, and total failure to make any proper discovery response.

---

[31] As argued in CBG's petition for a writ of certiorari, the court of appeals clearly acted erroneously in dismissing the complaint as to the three companies. It found that they "complied with the discovery order by filing affidavits stating that they had issued no policies covering risks in Pennsylvania or associated with either CBG or the Pittsburgh office of Marsh & McLennan." J.A. Vol. II, 378a. The court of appeals, in absolving the three companies from the sanction on the basis of their affidavits, ignored the possibility that the three had written coverage for Pennsylvania insureds or through Pennsylvania brokers other than Marsh & McLennan. The court of appeals also admittedly failed to consider the evidence of in personam jurisdiction over the three companies apart from the sanction. J.A. Vol. II, 377a, n.9.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in taking as established the facts necessary to sustain personal jurisdiction as a discovery sanction under F.R.Civ.P. 37(b)(2)(A). The discovery sanction was justified by the repeated failure of the excess insurers to comply with orders compelling the production of information relevant to the question of personal jurisdiction. The excess insurers had made the quantum of their Pennsylvania business a significant issue, but they repeatedly failed to produce information on that issue, as ordered by the district court. Although a finding of willfullness is not a prerequisite to the imposition of such a sanction, the record establishes that the excess insurers acted willfully and in bad faith in refusing to comply with the district court's orders.

The sanction was further justified as a means to deter abusive resistance to discovery such as that carried out by the excess insurers as part of their overall pattern of stalling tactics. The sanction went no further than necessary to cure the prejudice caused to CBG by the excess insurers' failure to comply with the discovery orders, and the sanction did not impair the ability of the excess insurers to defend the case on the merits.

While we submit that the excess insurers have not preserved their due process claims, having failed to raise them in a timely manner below, we submit that the excess insurers have not been denied due process of law. The defense of lack of personal jurisdiction is a waivable defense, and the excess insurers should be deemed to have waived that defense by their failure to comply with applicable discovery rules and by their refusal to obey discovery orders properly entered by the district court, knowing that such conduct would lead to the sanction.

It should not be necessary as a prerequisite to the imposition of such a sanction that the district court first find personal jurisdiction apart from the sanction. Such a determination can be rendered impossible by the very failure to comply with discovery orders. In any event, CBG did introduce in the district court sufficient evidence upon which the district court could find personal jurisdiction apart from the sanction, and it did so find. Its findings of personal jurisdiction apart from the sanction are not at issue here, not having been challenged in the cross-petition for certiorari.

The excess insurers were not prevented by any outside force beyond their control from complying with the discovery orders, and the district court's sanction did not dispose of the case on the merits. In light of the district court's warning that continued failure to produce the information would lead to the sanction of finding personal jurisdiction, the excess insurers' persistence in that failure was a voluntary waiver of the defense of lack of personal jurisdiction. The discovery sanction, therefore, was consistent with due process.

ARGUMENT

The District Court Properly Took as Established the Facts Necessary to Sustain Personal Jurisdiction as a Sanction Under F.R.Civ.P. 37(b)(2)(A) for Cross-Petitioners' Repeated Failure to Obey Orders Directing Them To Produce Information Relevant to Personal Jurisdiction.

The federal judiciary and the legal community have become increasingly concerned over the delay and expense caused by discovery abuse in civil litigation.[32] Although some

---

[32] See e.g. Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J. concurring); ACF Industries, Inc. v. EEOC, 439 U.S. 1081, 1086-1088 (1979) (Powell, J. joined by Stewart and Rehnquist, JJ., dissenting from denial of certiorari); Amendments to Federal Rules of Civil Procedure, 446 U.S. 997, 998-1000 (1980) (dissenting statement of Powell, J., joined by Stewart and Rehnquist, JJ.); J. Ebersole and B. Burke, Discovery Problems in Civil Cases (Federal Judicial Center, 1980); ABA Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse (1980); Burger, Annual Report on the State of the Judiciary - 1980, 66 A.B.A.J. 295, 296 (1980); Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Cal.L.Rev. 264 (1979); Note, The Emerging Deterrence Orientation in the Imposition of

Continued

concern has focused on "over-discovery," it has been recognized that resistance to discovery is an equally insidious form of discovery abuse.[33] This case concerns the proper judicial response to the latter form of discovery abuse. It involves defendants who assert a lack of personal jurisdiction but whose attempt to frustrate and stall discovery of facts relevant to that defense includes refusal to obey orders of the district court. We respectfully submit that the district court did not abuse its discretion in taking the jurisdictional facts as established under F.R.Civ.P. 37(b)(2)(A) and, although we suggest that the excess insurers have waived the point, that the excess insurers were not denied due process of law.

1. The District Court Did Not Abuse Its Discretion in Imposing the Discovery Sanction.

As held by the court of appeals in this case, the district court undoubtedly had the power to impose the discovery sanction.[34] The district court unquestionably possessed jurisdiction to determine its jurisdiction. *Land v. Dollar*, 330 U.S. 731, 739 (1947); *United States v. United Mine Workers*, 330 U.S. 258 (1947). As the excess insurers apparently concede (see Brief for Cross-petitioners, p. 12) CBG was entitled to discov-

---

Discovery Sanctions, 91 Harv.L.Rev. 1033 (1978). Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century, 76 F.R.D. 277, 288-290 (1978); Bell, The Pound Conference Follow-Up: A Response From the United States Department of Justice, 76 F.R.D. 320, 328 (1978); ABA, Report of Pound Conference Follow-Up Task Force, 74 F.R.D. 159, 191-192 (1976).

[33] See e.g. C. Ellington, A Study of Sanctions for Discovery Abuse, pp. 10-11 (U.S. Dept. of Justice, 1979). This particular study concludes that unwillingness on the part of district court judges to impose sanctions is a factor which encourages this "frequently encountered abuse of discovery." Id. pp. 10-11, 117.

[34] 651 F.2d at 882 (J.A. Vol. II, 369a). Indeed, as noted by the court of appeals, the excess insurers "never questioned the district court's power to order production of their records", a point which we submit is relevant to the issue of whether the excess insurers have preserved their due process claim for review in this Court. See pp. 36-37, below.

ery of facts relevant to the personal jurisdiction defense raised by the excess insurers' answer and summary judgment motion. By virtue of its jurisdiction to determine jurisdiction, the district court plainly had the power to consider the excess insurers' objections to CBG's discovery requests, to overrule those objections, to enter an order compelling discovery and to impose sanctions under F.R.Civ.P. 37(b)(2)(A) for the excess insurers' failure to comply with the discovery orders of the district court. *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979); *see Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971). In objecting to CBG's discovery requests, the excess insurers did not question the district court's jurisdiction to determine jurisdiction, nor did they question its power to order discovery as an exercise of that preliminary jurisdiction. J.A. Vol. I, 26a-28a, 68a-69a.

This Court in *Land v. Dollar, supra*, held that the jurisdiction to determine jurisdiction gives the district court the power to conduct a trial on the merits in advance of a ruling on subject matter jurisdiction where the facts upon which subject matter jurisdiction depends are also related to the merits of the case. 330 U.S. at 739. A fortiori, the district court in the case at bar had the power to issue and to enforce discovery orders relating to the question of personal jurisdiction.

Because the district court in the case at bar had the power to require discovery, we submit that the real question before this Court is whether the district court abused its discretion in imposing the sanctions as an exercise of that power. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). We submit that the court of appeals correctly found that there was no abuse of discretion in this case.

As set forth in greater detail above in the Statement of the Case, the excess insurers moved for summary judgment alleging a lack of personal jurisdiction nearly a year and one-half after they answered the complaint on the merits. They filed affidavits purporting to set forth the extent of their Pennsylvania business. CBG requested production of documents which would disclose whether, as CBG contended, the excess insurers were doing such substantial business in Pennsylvania that they were subject to in personam jurisdiction.

The excess insurers' responses to this request consisted of a series of strategems to delay the proceedings, to distract the court, and to avoid production of relevant information. *First,* they objected on the grounds of relevance and burdensomeness. The request was burdensome, they said, because it covered too much time. Their objections were overruled, though the court did limit the time covered by the request. *Second,* they said it would take ninety days to gather the information. *Third,* they sought and obtained an extension of thirty days to produce, saying they thought they could respond in that time. *Fourth,* during the 120 days given them they gathered and produced nothing but invited the plaintiff to go to fifteen locations in London, Gloucester, Brussels and Tel Aviv to gather the information. *Fifth,* they represented that the information was not at the fifteen locations but was in the hands of London insurance brokers. Six months after the entry of the original order to produce, they asked the brokers to gather the information, but the brokers responded that they could not get the documents in the time allowed and with no guidance or assistance from the defendants. *Sixth,* though on December 21, 1978 the court gave the excess insurers 60 days to produce the documents lest they suffer the sanction, they actually had twice that time, because the sanction was not entered until April 19, 1979. *Seventh,* while all of the foregoing events were occurring, between July 27, 1978 and April 19, 1979, the excess insurers were active not in responding to the discovery request but in filing a series of meritless motions and filing a parallel action in England, all with the effect of directing the case farther off course. On the basis of these circumstances, and on the basis of evidence that it had in personam jurisdiction, the district court entered the sanction.

We submit that these facts alone justify the district court's exercise of discretion in imposing a sanction under the standard of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).[35] *See United States v. Sumitomo Marine & Fire Insurance Company*, 617 F.2d 1365 (9th Cir. 1980); *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979); *Affanato v. Merrill Bros.*, 547 F.2d 138 (1st Cir. 1977).

The Brief for Cross-Petitioners ignores the actual circumstances and evidence before the district court. It argues that the district court abused its discretion in entering a sanction for failure to produce documents which the excess insurers now (for the first time) say were beyond their control. Also, the brief argues that the court abused its discretion in requiring that voluminous documents be transported across the ocean. Further, it argues that the district court failed to find that the excess insurers' behavior was willful. None of these arguments has merit. The district court never ordered the excess insurers to produce documents not in their control and never ordered them to ship documents anywhere. They did act willfully in their refusal to produce documents, but as a matter of law willfulness need not be shown to support the carefully tailored sanction which was entered. Their arguments are an example of the distortions which have caused so much delay in this case.

At hearings before the district court, counsel for the excess insurers informed the court that documents responsive to CBG's request were in the hands of London brokers. When counsel described the difficulty in gathering documents from the numerous brokers, the court suggested that the brokers be sent a form letter. The excess insurers never took the position before the district court that the policies kept by the brokers were beyond the defendants' control. Going to the brokers was the defendants' idea. They gave the clear impression that the documents were in their control, that they could have them from the brokers for the asking, and that the only problem was one of time. J.A. Vol. I, 94a-96a, 110a-111a. In the formal objection which they filed to CBG's request, they did not argue that the documents requested were not in their control (though they did argue that some of the policies were already in CBG's control, those being the policies they had issued to CBG). J.A. Vol. I, 68a-69a. The failure of the excess insurers to raise this objection in the district court precludes them from raising it now. See authorities at pp. 36-37, below.

---

[35] The record in National Hockey League v. Metropolitan Hockey Club, Inc., supra, is similar in some respects to that in the case at bar. There, the sanction of dismissal was imposed where the plaintiffs failed to answer interrogatories for a period of over 17 months after they were due, after numerous extensions had been granted and after the plaintiffs had been warned that failure to comply would result in the imposition of sanctions. The sanction imposed in the case at bar, however, is relatively mild when compared with the sanction involved in *National Hockey League*.

The Brief for Cross-Petitioners argues (at pp. 28-29) that the policies in the hands of the brokers were not in the control of the insurers because the brokers were agents of the insured. For this proposition they cite the testimony of their English barrister who testified as an advocate for their position. J.A. Vol. II, 317a. His testimony was contradicted by evidence that the insurers relied upon the broker to deliver the policy, collect the premium and obtain counsel for them when they were sued by the insured. See p. 7 and note 28 on p. 21, above. Furthermore, the barrister did not testify that policies in the hands of the brokers were beyond the control of the insurers. In the district court, as already noted, the excess insurers indicated that the policies were available to them, but that they would need time to make contacts with the numerous brokers with whom they had dealt.

As a second attack on the district court's exercise of discretion, the insurers acknowledge that they have documents in their possession which are responsive to CBG's request, but they object "to transporting more than four million files across the ocean from London to Pittsburgh, an obviously impossible (from any practical standpoint) thing to do." Brief, p. 33. Again the excess insurers' argument distorts the record and is factually misleading. The issue before the district court was *whether* responsive documents would be produced, not *where* they would be produced. CBG's motion to compel production as well as the district court's orders to produce said nothing about where production was to take place. J.A. Vol. I, 100a-102a.

The problem was that the excess insurers had made an offer not to produce documents but to produce "approximately 4,000,000 files" which would have to be reviewed "to determine if the insured risk was derived in some fashion from Pennsylvania." These files were offered at fifteen scattered locations most of which were in London, but others of which were in Gloucester, Worthing (Sussex, England), Brussels and Tel Aviv. J.A. Vol. I, 99a; Vol. III, 428a-429a.

Though they had indexes analyzing the files which had enabled them to state the purported extent of their Pennsylvania business in affidavits, they offered only to make the files themselves available, without indexes and without using the indexes to isolate the files showing their Pennsylvania business. Also infuriating was the fact that they took the full four months given them by the court, promising during that time to produce the documents, but in the end producing only an affidavit stating where the files are. Surely they knew at the outset where their home office files were; it did not take them four months to find them. During the four months they made no search of the files themselves, or at least gave no indication of having done so. They prolonged the case by four months and did nothing. They then prolonged it further by asserting that the documents would have to be secured from London brokers, and delayed their approach to the brokers so long that the document gathering effort became a charade. See above, pp. 12-13, 14, 15, above.

CBG was entitled to see not files, but documents which were responsive to its request. *Kozlowski v. Sears Roebuck & Co.*, 73 F.R.D. 73, 76-77 (D. Mass. 1976). The scattered files, the excess insurers admit, might or might not contain responsive documents.[36] In light of the fact that the insurers have indexes and have greater familiarity with their records than does CBG, the task of isolating the Pennsylvania business should fairly be imposed on them. It was not an abuse of discretion for the district court to have done so.

In their final attack on the district court's exercise of discretion, the excess insurers argue that the court could enter sanctions only if their failure to produce was willful, and they say that there was no finding of willfulness. Brief, p. 36. However, it is clear from the district court's findings of fact, which were accepted by the court of appeals, and from the record in this case that the excess insurers did act willfully in failing to comply with the discovery orders. As indicated by the court of appeals (651 F.2d at 882; J.A. Vol. II, 370a), the excess insurers did not make a good faith effort to comply with the orders of July 27, and November 8 and December 21, 1978, and we submit that bad faith and willfullness are clearly manifest in the facts found by the district court. The conclusion that the excess insurers proceeded willfully and in bad faith is inescapable considering the fact that they never searched their own files and considering their six-month delay in attempting to get documents from brokers. The excess insurers also acted willfully in attempting to place the entire burden of compliance on the brokers and by failing to offer "the necessary assistance to the various brokers in gathering documents and getting the requested information which would be necessary under the circumstances." District court's findings, J.A. Vol. I, 198a.

---

[36] Such a production of 4,000,000 files would have been an extreme example of the "reprehensible practice" and "chicanery" of attempting "to burden discovery with volume or disarray" by deliberately "mixing critical documents with others in the hope of obscuring significance." ABA Section of Litigation, Report of the Special Committee for the Study of Discovery Abuse 22 (1977). The 1980 Amendment to F.R.Civ.P. 34(b) was intended to halt such practice. See Note of Advisory Committee to 1980 Amendment of F.R.Civ.P. 34(b); Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century, 76 F.R.D. 277, 289 (1978).

Although it is manifest from the record that the excess insurers willfully and in bad faith violated the district court's orders, we submit that the excess insurers are in error in arguing that a sanction under F.R.Civ.P. 37(b) cannot be imposed for failure to obey an order to produce documents unless the district court finds that the failure is willful. Rule 37 was amended in 1970 to make it clear that willfulness is not a pre-condition to the imposition of a sanction but is "relevant only to the selection of sanctions, if any, to be imposed." Note of Advisory Committee to 1970 Amendment to Rule 37. In *National Hockey League v. Metropolitan Hockey Club, supra*, there was no finding that the failure to comply with the discovery orders was willful. Rather, this Court affirmed the dismissal of an action as a Rule 37 sanction on the basis of findings that the failure was the result of the plaintiffs' "'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities." 427 U.S. at 643.[37] *See also Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979) (sanction of dismissal justified by gross negligence); *Affanato v. Merrill Bros.*, 547 F.2d 138 (1st Cir. 1977).

If something less than willfullness can justify the district court terminating or deciding litigation on the merits under

---

[37] That this Court approved in National Hockey League v. Metropolitan Hockey Club, Inc., supra, the ultimate sanction of dismissal based upon a degree of culpability less than "willfullness" is, we suggest, apparent from the question presented in that case: "Whether under Fed.R.Civ.P. 37(b)(2)(C) and Societe Internationale v. Rogers, 357 U.S. 197 (1958), a district court has discretion to dismiss a complaint for violations of discovery orders where the violations, though resulting from gross negligence, were not provably intentional." Petition for Writ of Certiorari at 2, National Hockey League v. Metropolitan Hockey Club, Inc., supra.

Rule 37, *National Hockey League v. Metropolitan Hockey Club, Inc., supra*, then we respectfully submit that the conduct of the excess insurers in the case at bar is sufficiently culpable to warrant the sanction imposed by the district court—a milder sanction which allows the excess insurers to defend the case on the merits.[38]

After the sanction was entered, the excess insurers retained new counsel, who tried to absolve the insurers and obtain removal of the sanction by offering to produce the unproduced documents. J.A. Vol. I, 213a; Vol. II, 217a-219a. Because the sanction had been entered and the issue of in personam jurisdiction had been disposed of, the offer was insufficient and tardy. J.A. Vol. II, 219a-220a. The offer was made only in general terms. It was not clear whether it was a repetition of the offer of four million files or whether the insurers would produce precisely the documents which had been requested. When the excess insurers produced documents in London in June and July 1979, documents regarding their Pennsylvania business were not among them. The district court did not abuse its discretion by continuing the effect of the sanction, even after the vague offer to produce was made by new counsel.[39]

Furthermore, once sanctions are entered, they should not be lifted. This Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc., supra*, is significant in approving the imposition of discovery sanctions not only as a means to insure specific performance of discovery obligations, but also as a deterrent to other litigants. 427 U.S. at 643. The adoption of the deterrence rationale has been acclaimed as providing a needed weapon to stem the tide of discovery abuse. *E.g.* Renfrew, *Discovery Sanctions: A Judicial Perspective,* 67 Cal.L.Rev. 264 (1979); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 Harv.L. Rev. 1033 (1978).

---

[38] Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974), a case upon which the excess insurers rely in their brief (p. 35), does not support the proposition for which the excess insurers cite it. See Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1067 (2d Cir. 1979).

[39] Under Rule 37(b)(2)(A), the court had entered an order that the facts supporting personal jurisdiction should be finally "taken as established for purposes of the action."

Further, the change in counsel and the fact that former counsel might have been at fault does not now provide a basis for lifting the sanction. See National Hockey League v. Metropolitan Hockey Club, Inc., supra, at 641-642; Link v. Wabash R. Co., 370 U.S. 626, 633-634 (1962).

As this Court recognized in *National Hockey League v. Metropolitan Hockey Club, Inc.,* discovery sanctions will not deter discovery abuse if compliance with court orders after imposition of the sanction will act to eliminate the sanction, and to hold otherwise would encourage dilatory tactics. 427 U.S. at 642-643. *See Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.,* 602 F.2d 1062, 1068 (2d Cir. 1979). Such a holding also would embroil trial judges in day-to-day supervision of discovery. *Dellums v. Powell,* 566 F.2d 231, 235-236 (D.C. Cir. 1977). We submit that the excess insurers' argument would eliminate the important distinction between an order imposing sanctions under Rule 37(b)(2) and an order compelling discovery under Rule 37(a), thereby leaving them and like-minded litigants free to continue their abusive resistance to discovery. *See G-K Properties v. Redevelopment Agency,* 577 F.2d 645, 647-648 (9th Cir. 1978); Renfrew, *Discovery Sanctions: A Judicial Perspective,* 64 Cal. L. Rev. 264, 271 (1979).

The practical effect of the adoption of a deterrence rationale in *National Hockey League v. Metropolitan Hockey Club, Inc., supra.,* was to encourage an increase in the use of sanctions as a means of combating discovery abuse. *E.g. G-K Properties v. Redevelopment Agency,* 577 F.2d 645, 647 (9th Cir. 1978). We respectfully submit that a decision by this Court reversing the discovery sanction imposed in the case at bar would have an undesirable chilling effect on the use of discovery sanctions in the federal courts. It is necessary to deal sternly with the violation of discovery orders to deter abuse and "to prevent eroding the integrity of court decrees." Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 Col. L. Rev. 480, 483 (1958).

The sanction in the case at bar clearly was justified both in terms of the particular litigation and as a general deterrent. It did not foreclose the excess insurers from maintaining a defense on the merits, and it imposed punishment only to the extent necessary to prevent the excess insurers from benefiting as the result of their failure to comply with the particular discovery orders. The use of such sanctions should be encouraged. We, therefore, respectfully submit that this Court should hold that the imposition of the sanction in the case at bar was well within the district court's discretion.

2. The Excess Insurers Have Waived Their Due Process Claim.

The excess insurers argue that the sanction imposed by the district court violated their constitutional right to due process of law because the district court imposed the sanction for violation of discovery orders in the absence of any finding of in personam jurisdiction. While CBG contends in point 3, below, that this claim is without merit, we respectfully submit that the excess insurers have not preserved this constitutional claim for review.

It is well settled that a claim of constitutional magnitude can be waived by failure to raise the claim in a timely manner below. *E.g. Yakus v. United States,* 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court."); *see Duignan v. United States,* 274 U.S. 195, 199 (1927). The excess insurers failed to raise their constitutional claim when discovery matters were considered in the district court.

The record discloses that the excess insurers did not object to the motion to compel discovery or the motion for sanctions on the ground that the district court could not enter the requested orders unless it first determined that it had personal jurisdiction. Indeed, the excess insurers assured the court that they would comply with the orders compelling discovery which are now challenged on due process grounds. The failure to raise an objection to production of documents in the response required by F.R.Civ.P. 34(b) waives the right to make that objection. *Antico v. Honda of Camden*, 85 F.R.D. 34 (E.D. Pa. 1979); *Perry v. Golub*, 74 F.R.D. 360 (N.D. Ala. 1976); *see Diapulse Corp. of America v. Curtis Publishing Co.*, 374 F.2d 442, 445 (2d Cir. 1967); *cf. Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 617 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978) (similar holding with respect to waiver of objection to interrogatories); *Davis v. Romney*, 53 F.R.D. 247 (E.D. Pa. 1971) (same holding). We submit that this principle is particularly applicable to a failure to object based upon a contention under the constitution. It is a corollary of the policy against deciding constitutional questions except when necessary. *See Hagans v. Lavine*, 415 U.S. 528 (1974).

In short, the excess insurers never raised in the district court the issue involved in *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3864 (1981). We, therefore, respectfully submit that the excess insurers have waived their due process contention.

3. The Excess Insurers Have Received Due Process of Law.

According to the excess insurers, the district court denied due process (a) when it entered a sanction against them without first having determined that it had personal jurisdiction over them, and (b) when it ordered them to make discovery when there had been no prima facie showing of personal jurisdiction by the plaintiff. These arguments are deficient in their analysis of the law and the record in this case.

The district court had the power to enter the sanction without first determining that it had in personam jurisdiction.

However, whatever its powers, the district court in fact did determine on the basis of evidence presented prior to the entry of the sanction that it had personal jurisdiction over the excess insurers. J.A. Vol. I, 199a-201a. Furthermore, whatever the court's powers, the plaintiff did present a prima facie case of in personam jurisdiction before the court ordered the defendants to produce documents. Affidavits filed by the plaintiff showed the defendants' activity through agents in the jurisdiction and showed their knowing entry into the jurisdiction in the underwriting upon which suit was brought. See pp. 19-22, above. In their cross-petition, the excess insurers did not seek review of the district court's decision, which was not disturbed by the court of appeals, that, apart from the sanction, it has personal jurisdiction over the defendants.[40]

Pressing their due process argument, the excess insurers would have this Court approve the holding of *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (5th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3864 (1981), a decision which the court of appeals refused to follow in the case at bar.[41] In that case, where defendants who challenged personal jurisdiction failed to answer interrogatories on the jurisdictional question, the district court entered a sanction consisting of a default judgment.

---

[40] It appears that the excess insurers are attempting by indirection to obtain review of that question in this Court. They assert in their brief (pp. 22-28) that CBG failed to prove a prima facie case of personal jurisdiction under the guise of arguing that a discovery order cannot be entered against a non-resident defendant prior to a finding of personal jurisdiction in the absence of such a prima facie showing. That question was not raised in the cross-petition for certiorari and, therefore, is not properly before this Court. When that argument is coupled with the argument in the Brief for Cross-petitioners (p. 37) that "[t]he sanction violated traditional notions of fair play and substantial justice", citing International Shoe Co. v. Washington, 326 U.S. 310 (1945), another question not raised in the cross-petition, it is clear that the excess insurers really are arguing the propriety of the district court's alternative finding of personal jurisdiction apart from the sanction. We submit that such an argument is improper in light of the posture of this case and in light of the question presented in the cross-petition upon which this Court granted certiorari. We, however, note that the court of appeals, while not reaching the question, indicated that CBG's evidence demonstrating personal jurisdiction apart from the sanction was substantial. 651 F.2d at 886, n.9; J.A. Vol. II, 377a. We further note that the evidence introduced before the district court makes a strong prima facie case of personal jurisdiction. See pp. 19-22, above.

That decision is paradoxical. The Fifth Circuit recognized that a district court may allow discovery on the personal jurisdiction issue and may enter appropriate orders compelling discovery and imposing sanctions if the defendant resists discovery. 629 F.2d at 1137. The court also recognized that the plaintiffs had the burden of establishing in personam jurisdiction and that the plaintiffs in that case "were foreclosed from presenting jurisdictional evidence in the exclusive possession of the defendants because the defendants refused to disclose the information in response to discovery procedures." 629 F.2d at 1138. Yet, the court of appeals reversed the default judgment entered against the defendants as a sanction for failure to comply with discovery requirements, and the court indicated that it also would have been error for the district court to take the jurisdictional facts as established. The Fifth Circuit's rationale was that a district court cannot create its own jurisdiction and cannot enter a judgment unless the plaintiffs prove that the defendants are subject to personal jurisdiction — a factual showing which the court acknowledged might well be impossible by reason of the refusal to make discovery.

We respectfully submit that *Familia de Boom v. Arosa Mercantil, S.A., supra*, is distinguishable and wrongly decided. Unlike the present case, the Fifth Circuit case involved a sanction of default judgment and no independent evidence of jurisdiction. The Fifth Circuit case is wrongly decided because it would permit a defendant to avoid the exercise of jurisdiction over his person merely by refusing to comply with discovery orders. The *Familia de Boom* court likewise encourages defendants to erode "the integrity of court decrees"[42] by rendering district courts powerless to enforce discovery orders through imposing meaningful sanctions which not only would safeguard the rights of plaintiffs but would also act to deter others. The Fifth Circuit recognized the problem, but surprisingly threw up its hands and surrendered: "This leaves the district judge in a quandry in trying to enforce his discovery order, but that is a necessary result of the limitations of sovereignty under due process." 629 F.2d at 1139.

---

[41] The dissent in the court of appeals also refused to adopt the principle advanced here by the excess insurers based on Familia de Boom v. Arosa Mercantil, S.A., supra. 651 F.2d at 891; J.A. Vol. II, 388a.

We submit that the due process guaranty does not make it "necessary" for district judges to be left "in a quandry," any more than it allows a plaintiff's rights to be trampled upon by defendants who deny personal jurisdiction but then refuse to permit discovery of the facts necessary to determine jurisdiction. It would be a strange kind of judicial system which would reward parties for violating court orders. It would be a strange kind of due process which would place on plaintiffs the burden of proving personal jurisdiction but at the same time would deny plaintiffs access to information in the hands of a defendant.

Placing the due process argument in its proper context, it should first be recognized that lack of personal jurisdiction may be raised by a defendant in two ways. He may ignore the proceedings entirely and, if a default judgment is entered against him, prevent enforcement of the judgment by raising the jurisdictional defense. Alternatively, he may appear and defend on the ground of lack of personal jurisdiction. If he appears but does not raise the defense, the court is deemed to have personal jurisdiction, even if the facts would show otherwise, because lack of personal jurisdiction is a waivable defense. F.R.Civ.P. 12(h)(1). All of these courses are consistent with due process.

---

[42] Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col.L.Rev. 480, 483 (1958).

In the case at bar, the excess insurers chose to appear and raise the defense of lack of personal jurisdiction by summary judgment after they answered on the merits rather than taking their chances on raising personal jurisdiction as a defense to an action to enforce a default judgment.[43] Having made that choice, the excess insurers were bound to comply with the Federal Rules of Civil Procedure and with orders of court made under the Rules. Because the excess insurers chose not to comply with their discovery obligations and persistently ignored court orders, the district court imposed a sanction which is the equivalent of a waiver of the defense. *See English v. 2lst Phoenix Corp.*, 590 F.2d 723, 728 n.5 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979); *cf. Anderson v. Air West, Inc.*, 542 F.2d 1090, 1093 (9th Cir. 1976) (defendant's failure to appear for deposition after being ordered to appear by district court constitutes forfeiture of right to contest factual issues relevant to affirmative defenses of limitations and estoppel). The excess insurers chose by their conduct ultimately to waive the defense.

We submit that there is no reason to treat personal jurisdiction any differently from any other waivable defense as regards the obligation of a defendant to follow applicable rules of civil procedure. Likewise, there is no reason to treat the enforcement of court orders compelling discovery of facts relevant to personal jurisdiction any differently from orders compelling discovery of other facts.

The district court warned the excess insurers that continued failure to produce the information would lead to the sanction of finding personal jurisdiction. In light of that warning, the excess insurers' persistence in that failure was a voluntary waiver of the defense of lack of personal jurisdiction.

---

[43] It is noteworthy that under English law, which defendants say applies, the excess insurers would be deemed to have submitted to the jurisdiction of the district court and have waived any alleged lack of personal jurisdiction by answering CBG's complaint on the merits rather than by moving for dismissal under Rule 12(b)(2). See Henry v. Geopresco International, Ltd., [1976] Q.B. 726, [1975] 2 All E.R. 702.

The sanction of finding personal jurisdiction by reason of a failure to produce relevant information when ordered to do so did not deny due process. As in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 351 (1909), "the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."

The excess insurers were not prevented by any outside force beyond their control from producing the documents. The sanction was not more severe than reasonably necessary. Nor does the sanction prevent them from defending the case on the merits. We, therefore, respectfully submit that the excess insurers, in light of their failure to comply with court orders, received the process they were due.

CONCLUSION

The judgment of the court of appeals should be affirmed to the extent that it affirmed the discovery sanction imposed by the district court. CBG, however, still maintains that the judgment of the court of appeals otherwise should be reversed for the reasons stated in CBG's petition for certiorari at No. 81-290.

Respectfully submitted,

Cloyd R. Mellott
600 Grant Street, 42nd Floor
Pittsburgh, PA 15219
(412) 566-6000
Counsel of Record for Cross-respondent.

Of Counsel:
Dale Hershey
Robert W. Doty
Robert L. Byer
Jordan S. Weltman
ECKERT, SEAMANS, CHERIN & MELLOTT

January 15, 1982

Petitioner's Reply Brief

2

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. ST
CLERK

No. 81-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO., LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD.,

Cross-petitioners,

v.

COMPAGNIE DES BAUXITES DE GUINEE,

Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONERS

EDMUND K. TRENT
Reed Smith Shaw & McClay
P.O. Box 2009
747 Union Trust Building
Pittsburgh, Pennsylvania 15230
412-288-3144

Counsel of record
for Cross petitioners

Of counsel:

THOMAS P. LAWTON III
KENNETH K. KILBERT

HERBICK & HELD PRINTING CO., 1117 WOLFENDALE STREET, PITTSBURGH, PA. 15233

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Reply to Statement of the Case 1

Reply to Argument on Court's Power to Impose a Sanction before Finding Jurisdiction over Defendants' Persons 2

Reply to Argument Justifying Sanction because of Delay Caused by Defendants 8

Reply to Argument that Defendants had Control of the Documents not in their Possession or Custody 9

Reply to Argument that Defendants did not Produce their File Indexes, Mixed up their Documents, and Failed to Search their Files 11

Reply to Argument that Defendants' Failure to Produce Documents was Wilful 12

Reply to Argument that Defendants did not Produce their Files in London 14

Reply to Argument that Defendants Waived their Due Process Argument 15

Conclusion 19

TABLE OF AUTHORITIES

CASES PAGE

Benson Hotel Corporation v. Woods, 168 F.2d 694 (8th Cir. 1948) 5

B.F. Goodrich Tire Company v. Lyster, 328 F.2d 411 (5th Cir. 1964) 10

Blonder-Tongue v. University Foundation, 402 U.S. 313 (1971) 18

Carroll v. Associated Musicians of Greater New York, 206 F.Supp. 462 (S.D.N.Y. 1962), aff'd 316 F.2d 574 (2d Cir. 1963) 5

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 15

English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), cert. den. 444 U.S. 832 (1979) 3

Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), cert. den. 101 S.Ct. 2345 (1981) 15, 17

Friend v. Talcott, 228 U.S. 27 (1913) 16

Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964) 7

Ghazoul v. International Management Services, Inc., 398 F.Supp. 307 (S.D.N.Y. 1975) 5

Goff v. Armbrecht Motor Truck Sales, Inc., __ Pa. Superior Ct. __, 426 A.2d 628 (1980) 7

Herbst v. Able, 63 F.R.D. 135 (S.D.N.Y. 1972) 10

Imperial Chem. Indus. Ltd. v. National Distillers & Chem. Corp., 354 F.2d 459 (2d Cir. 1965) 5

In re Folding Carton Litigation, 76 F.R.D. 420 (N.D. Ill. 1977) 10

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 15

Jones v. United States, 362 U.S. 257 (1960) 16

Kearns v. Seven-Up Company, 30 F.R.D. 333 (E.D.Pa. 1962) 9

Klein v. East River Electric Light Co., 187 N.Y. 27, 74 N.E. 495 (1905) 10

Land v. Dollar, 330 U.S. 731 (1947) 3, 4

Lekkas v. Liberian M/V Caledonia, 443 F.2d 10 (4th Cir. 1971) 3

Marketing Showcase, Inc. v. Alberto-Culver Co., 445 F.Supp. 755 (S.D.N.Y. 1978) 5

Moragne v. States Marine Lines, 398 U.S. 375 (1969) 16

Paschall v. Kansas City Star Co., 441 F.Supp. 349 (W.D.Mo. 1977) 5

Petroleum Products Antitrust Litigation, CCH 1982-1 Fed. Trade Cas. ¶ 64,482 (10th Cir. Jan. 21, 1982) 13

Procunier v. Navarette, 434 U.S. 555 (1978) 17

Railroad Yardmasters v. Pennsylvania Railroad Company, 224 F.2d 226 (3d Cir. 1955) 5

Robinson v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966) 9

Triangle Mfg. Co. v. Paramount Bag Mfg. Co., 35 F.R.D. 540 (E.D.N.Y. 1964) 13

United States v. Bosurgi, 530 F.2d 1105 (2d Cir. 1976) 1

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 16

Welsh v. Gibbs, 631 F.2d 436 (6th Cir. 1980), cert. den. 450 U.S. 981 (1981) 7

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 15

Yules v. General Motors Corporation, 297 F.Supp. 674 (D.Mont. 1969) 7

Court Rules

F.R.C.P. 33(c) 13

F.R.C.P. 37 9

Sup. Ct. R. 21.1(a) 18

REPLY TO STATEMENT OF THE CASE

The misstatements of fact of any importance contained in the statement of the case in the brief for cross-respondent,[1] plaintiff-appellee below (pp. 3-23), are for the most part covered infra in defendants' reply to plaintiff's arguments under the specific headings to which they relate. Most of them consist of bald assertions which do not answer the contrary correct statements in defendants' main brief.[2] For example, plaintiff states (Br. p. 20) that a Bland Payne representative was "quoted in an affidavit filed by CBG as saying that 'when Bland Welch placed the coverage with the excess underwriters, it gave information about CBG'", without answering the undisputed fact, pointed out by defendants (Main Brief, p. 24), that the affidavit was by one of plaintiff's Pittsburgh lawyers, saying what had been told him by a Mr. White in London three years after the coverage was placed. Such an affidavit, not based on personal knowledge, is incompetent: *United States v. Bosurgi*, 530 F.2d 1105 (2d Cir. 1976). No affidavit at all was made by White.

In particular, plaintiff states (Br. p. 7) that Marsh & McLennan, plaintiff's agents to procure the coverage, were "acting on behalf of the excess insurers," without attempting to respond to defendants' demonstrations to the contrary (Main Brief, pp. 28-29). Space does not permit further detailed response to plaintiff's misstatements.[3]

---

[1] Hereinafter abbreviated "Br."

[2] Hereinafter abbreviated "Main Brief".

[3] Most egregious, although irrelevant to the questions now before the Court, is plaintiff's contention (Br. p. 18 fn. 23)

REPLY TO ARGUMENT ON COURT'S POWER TO IMPOSE A SANCTION BEFORE FINDING JURISDICTION OVER DEFENDANTS' PERSONS

The brief for cross-respondent, plaintiff-appellee below, does not come to grips with the fundamental question in the case: Can a district court order a person named as a defendant to comply with the plaintiff's discovery requests before the court has properly found such person subject to the court's jurisdiction? Plaintiff says (Br. pp. 26-27) that the excess insurer defendants apparently concede that plaintiff "CBG was entitled to discovery of facts relevant to the personal jurisdiction defense raised by the excess insurers' answer and summary judgment motion," citing the main brief for cross-petitioners, page 12. Defendant cross-petitioners made no such concession. The discussion on page 12 does not say this at all.

On page 33 defendants did say that plaintiff was certainly entitled to look at the documents in question. This was under their alternative argument (Main Brief, pp. 22, 33) that *if* they were required to produce the documents before jurisdiction had been established, they could properly be compelled to do so only at their home offices where the documents were kept. This alternative argument set forth an additional objection to the sanction order: that even if the district court had had preliminary personal jurisdiction over defendants sufficient to order them to produce documents, the order to produce four million files in Pittsburgh was an abuse of discretion (Main Brief, p. 28).

---

that defendants made arguments which they later admitted were spurious or waived. The record references cited by plaintiff prove neither that they made spurious arguments nor that they admitted they were spurious or waived.

Plaintiff then states (Br. p. 27) that by virtue of the district court's jurisdiction to determine jurisdiction it plainly had the power to rule on plaintiff's discovery requests and defendants' objections thereto, to make an order compelling discovery, and to impose sanctions for disobedience to that order, citing *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir.), cert. den. 444 U.S. 832 (1979), and *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971). Plaintiff makes no attempt to answer defendants' argument (Main Brief, pp. 17-20) that the reasoning of those cases does not justify subjecting a party to discovery if jurisdiction over his person has not first been established.

Plaintiff also states (Br. p. 27) that defendants did not question the district court's power to order discovery as an exercise of its jurisdiction to determine jurisdiction. Plaintiff fails to answer defendants' argument (Main Brief, p. 10 fn. 10) that defendants did question such power.

Plaintiff relies (Br. p. 27) on *Land v. Dollar*, 330 U.S. 731 (1947), for the proposition that when the question of jurisdiction[4] is dependent on decision of the merits (p. 735), the district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits (p. 739). Although defendants do not quarrel with the result of that case, they believe a more accurate and complete analysis would be that the district court had jurisdiction to determine its jurisdiction, which it could do in several ways, such as upon unopposed affidavits or by preliminary factual hearing. If such a hearing were to result in a finding of facts supporting jurisdiction, and, as in *Land v. Dollar*, those were also the ultimate facts at issue on the merits, then on the merits defendant would be bound by the findings made on jurisdiction.[5]

---

[4] That case involved subject-matter jurisdiction, not jurisdiction over defendants' persons. Personal jurisdiction was not disputed.

Plaintiff follows its summary of *Land v. Dollar* by a total non sequitur (Br. p. 27): "A fortiori, the district court in the case at bar had the power to issue and to enforce discovery orders relating to the question of personal jurisdiction." Such conclusion does not follow at all. Power to determine jurisdiction does not include power to make other orders before jurisdiction has been determined. Nothing in *Land v. Dollar* supports power in a court to make any order whatever against a defendant before jurisdiction over his person has been established.

Plaintiff contends (Br. p. 38) that the District Court determined on the basis of evidence presented prior to the entry of the sanction that it had personal jurisdiction over the defendants.[6] A preliminary jurisdictional finding based solely upon conflicting affidavits, however, does not establish personal jurisdiction so that defendants are precluded from challenging the court's jurisdiction over them later in the same proceeding. While a district court may deny a pretrial motion to dismiss for lack of in personam jurisdiction on the basis of affidavits alone, such a ruling in no way relieves the plaintiff of its burden to establish subsequently by a preponderance of the evidence that the court has jurisdiction over the defendants: *Marketing Showcase, Inc. v. Alberto-Culver Co.*, 445 F.Supp. 755, 759 (S.D.N.Y. 1978); *Ghazoul v. International Management Services, Inc.*, 398 F.Supp. 307, 309 (S.D.N.Y. 1975).

---

[5] Unless, perhaps, he was entitled to trial on the merits by jury. If the jury were to make findings contrary to those made by the court on preliminary hearing, the defendant, absolved on the merits, would have no reason to complain of the preliminary finding of jurisdiction.

[6] Plaintiff argues (Br. p. 38 fn. 40) that "the district court's alternative finding of personal jurisdiction apart from the sanction," which the Court of Appeals did not pass upon (377a fn. 9), stands to support jurisdiction over defendants because their cross-petition did not seek review of that finding. The simple answer to this argument is that the District Court did not make any such alternative finding. He based his deci-

And findings and conclusions made on preliminary injunction are not final or conclusive: *Railroad Yardmasters v. Pennsylvania Railroad Company*, 224 F.2d 226, 229 and fn. 2 (3d Cir. 1955). This includes findings as to jurisdiction: *Carroll v. Associated Musicians of Greater New York*, 206 F.Supp. 462, 473 (S.D.N.Y. 1962), aff'd 316 F.2d 574 (2d Cir. 1963). On the permanent injunction hearing these issues must be retried *(Imperial Chem. Indus. Ltd. v. National Distillers & Chem. Corp.*, 354 F.2d 459, 463 (2d Cir. 1965)) "as though no temporary injunction had been applied for or issued": *Paschall v. Kansas City Star Co.*, 441 F.Supp. 349, 355-6 (W.D.Mo. 1977), citing *Benson Hotel Corporation v. Woods*, 168 F.2d 694, 697-8 (8th Cir. 1948).

---

sion on both the sanction and the other grounds (356a-357a). He did not find that apart from the sanction he had jurisdiction. The other grounds being insufficient as a matter of law to support a finding of jurisdiction (Deft. Main Brief, pp. 22-28), without the sanction Judge Simmons could not properly have found jurisdiction, and nothing in the record indicates that he would have done so. On the contrary, if his jurisdictional ruling had been based alternatively only on the other evidence and not partly on the sanction, he would not, and properly could not, have barred defendants (as he did: 227a, 228a) from contesting those findings at the final hearing.

To support its contention (Br. p. 38) that it did present a prima facie case of in personam jurisdiction before the district court ordered defendants to produce documents, plaintiff relies (Br. p. 38) on its affidavits, without making the slightest attempt to answer defendants' arguments (Main Brief, pp. 23-28) that the affidavits were incompetent to prove what plaintiff wished them to prove.

In addition, and in particular, none of plaintiff's affidavits contained anything which would support a finding, essential to jurisdiction in personam, that defendants had invoked the benefits and protections of Pennsylvania laws or had reason to expect to be haled before a Pennsylvania court. The mere fact that defendants insured some risks[7] in Pennsylvania is not evidence that they were doing business there. Plaintiffs have made no attempt to answer defendants' argument on this point (Main Brief, pp. 27-28).

Even if plaintiff's affidavits had set forth facts sufficient if true to constitute a prima facie showing of jurisdiction over defendants (which defendants deny), a finding by the District Court that the plaintiff had established jurisdiction could not have been properly made in the face of defendants' opposing affidavits. Where the affidavits raise disputed issues of fact or questions of credibility, the district court should conduct a hearing to resolve the personal jurisdiction issue prior to trial on the merits: *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), cert. den. 450 U.S. 981 (1981); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir. 1964). Where questions exist as to jurisdictional facts, it is reversible error not to hold a hearing: *Goff v. Armbrecht Motor Truck Sales, Inc.*, __ Pa. Superior Ct. __, 426 A.2d 628 (1980). A preliminary hearing is particularly appropriate in the present case, because the jurisdictional issue is not intertwined with the merits, and the cost and burden of a full trial on the merits may be avoided if the jurisdictional issue is decided in favor of the defendant. See, e.g., *Yules v. General Motors Corporation*, 297 F.Supp. 674, 675 fn.1 (D.Mont. 1969).

---

[7] Plaintiff's reference (Br. p. 17) to $108,255 of premiums from Pennsylvania business received by defendant Eagle Star is misleading, because Eagle Star has not contested personal jurisdiction. Plaintiff's reference (Br. p. 17) to defendant Turegum is misleading for the same reason.

Under the principle that a district court should determine jurisdiction over the defendants' persons before making any other orders against them, the District Court below should have held a hearing and, if the evidence of jurisdiction was sufficient, he should have made findings of fact to support a conclusion of personal jurisdiction over defendants. Only after making such findings would he have been warranted in ordering defendants to comply with plaintiff's discovery requests. Defendants should then have been given an opportunity to comply.

In the present case the District Court did not give defendants such an opportunity. Before making any findings of jurisdiction over them, he ordered them to produce the documents (93a-96a, 115a-116a). After they had failed to produce, he made simultaneous findings at the preliminary injunction hearing that defendants were subject to his jurisdiction (in effect, that there was sufficient evidence to support a finding of jurisdiction), that defendants were subject to sanctions for not producing the documents, and that a sanction should be imposed holding them subject to personal jurisdiction (195a-202a). Although this jurisdictional ruling was based only on affidavits (42a-65a) and the sanction, he barred defendants from ever again contesting it (226a, 227a). As shown above (pp. 4-6), unless the sanction was valid, this was clearly beyond the Court's power.

REPLY TO ARGUMENT JUSTIFYING SANCTION BECAUSE OF DELAY CAUSED BY DEFENDANTS

Plaintiff's principal argument in support of the sanction is (Br. pp. 27-29) that defendants resorted to "a series of strategems to delay the proceedings, to distract the court, and to avoid production of relevant information." This charge is unsupported by the record. Plaintiff's first request for documents, served August 9, was filed November 19, 1976; defendants filed their objections on January 24, 1977; and plaintiff filed its motion to compel on May 12, 1977 (1a). Defendants filed their affidavits and motion (31a-42a) for summary judgment eight days later, on May 20, 1977 (1a). It was not until April 7, 1978 (2a) that plaintiff filed its counter-affidavits (42a-65a). A hearing was held June 14, 1978 (65a); plaintiff filed its second request for documents (67a) on July 14 (2a); defendants filed their objections (68a) three days later (2a); defendants filed additional affidavits (69a-86a) on July 27 (2a); and the Court held a hearing on that day. The longest delay—ten months—was that of plaintiff, in filing its counter-affidavits in opposition to defendants' motion for summary judgment. Defendants' offer to produce their records in London (2a, 99a) was within the time allowed for production (96a) as extended by the Court (98a).

The order for production in the present case (115a) was made after defendants had offered to produce their records in London (99a, 103a, 114a-115a). "Rule 37, by its terms, does not impose sanctions for *delay*. . . .": *Kearns v. Seven-Up Company*, 30 F.R.D. 333, 334 (E.D.Pa. 1962). If Judge Simmons' sanction order was based upon defendants' delay of four months, it was improper for that reason also:[8] *Robinson v. Transamerica Insurance Co.*, 368 F.2d 37 (10th Cir. 1966).

REPLY TO ARGUMENT THAT DEFENDANTS HAD CONTROL OF THE DOCUMENTS NOT IN THEIR POSSESSION OR CUSTODY

Plaintiff's summary of events (Br. p. 30) is incorrect. Plaintiff's requests for documents did not ask for the contracts of insurance in defendants' possession; they asked for copies of insurance policies (first request, ¶¶7, 8, 26a-27a; second request, 68a). When defendants' counsel told the Court (94a) that defendants did not retain copies of the policies, which were in the hands of more than 150 London brokers, the Court told her to obtain them from the brokers in sixty days (95a), later increased to ninety (96a). Despite defendants' objections and misgivings as to their ability to obtain the policies (95a-96a), they undertook to do so (96a).

Plaintiff argues (Br. p. 30) that defendants did not contend in the district court that the policies were not in their control. Plaintiff has overlooked defendants' denial

---

8. Judge Aldisert seemed to feel that defendants' delay in offering to produce their records in England might be a reason to hold them subject to jurisdiction in Pennsylvania (372a).

that the documents were "within the possession, custody and control of excess insurer defendants." (68a).[9] Plaintiff also ignores defendants' explanation (Main Brief, p. 37) that their New York counsel at first did not realize the enormous volume of the files containing the Pennsylvania policies (113a, 116a)[10], which were not indexed by political subdivisions (106a). The brokers were apparently willing to produce at least a limited number of policies in London, but not their entire files in Pittsburgh.

The general rule is that when documents sought by one party from another are in the possession or custody of a third person who is subject to the control of the party from whom the documents are sought, the latter must attempt to obtain them from such third person. If he is unsuccessful, then the party seeking the documents must himself resort to process against the third person: *In re Folding Carton Litigation*, 76 F.R.D. 420, 423 (N.D.Ill. 1977); *Herbst v. Able*, 63 F.R.D. 135, 137 (S.D.N.Y. 1972). It is clearly unfair to impose a sanction on a party because a third person, even if he is legally subject to the control of the party, refuses to obey him.

---

[9] The District Court found that defendants had denied control (352a).

[10] A statement by an attorney made under a mistake of fact is not binding on his client: *Klein v. East River Electric Light Co.*, 187 N.Y. 27, 74 N.E. 495 (1905). "... the trial court abused its judicial discretion in holding the defendant's attorney to an improvident agreement made in good faith in ignorance of essential facts": *B. F. Goodrich Tire Company v. Lyster*, 328 F.2d 411, 416 (5th Cir. 1964).

REPLY TO ARGUMENT THAT DEFENDANTS DID NOT PRODUCE THEIR FILE INDEXES, MIXED UP THEIR DOCUMENTS, AND FAILED TO SEARCH THEIR FILES

Plaintiff makes no argument to dispute defendants' point (Main Brief, pp. 29-34) that their files should have been examined in London, not in Pittsburgh. Plaintiff's objection to the offer to produce them in London is (Br. p. 31) that defendants had indexes which they did not offer to make available.

Defendants' indexes were only by major geographic area, not by political subdivision (106a-107a). The four million files were those involving risks in North America. Defendants were and are willing to make those available separate from their other records.

Plaintiff's charge (Br. p. 32 fn. 36) that the production of 4,000,000 files would have been an example of deliberately mixing critical documents with others is completely unsupported by the record. Defendants did not mix anything with the Pennsylvania records; those records were filed with all the other North American records in the regular course of defendants' business long before plaintiff asked for them.

Plaintiff argues (Br. pp. 31, 32) that defendants did not search their own files, but that they had indexes "which had enabled them to state the purported extent of their Pennsylvania business in affidavits." The record contains nothing to support this assertion. The indexes of some of the defendants may have contained percentage figures without showing their source (115a). Although plaintiff's document requests (22a, 67a) did not ask for indexes, defendants were and are certainly willing to make available (in London) whatever indexes they have.

Of the twelve defendant cross-petitioners which filed affidavits, nine[11] based their estimates of Pennsylvania business on a partial review of their records; three[12] reviewed them all and stated the number of Pennsylvania risks they had insured. The records which they did review, as well as all the others, will be separately available to plaintiff, but in London, in view of the bulk of most of them and in view of plaintiff's clearly stated desire and need to examine all the records of every defendant to make sure that none were being withheld (109a).

REPLY TO ARGUMENT THAT DEFENDANTS' FAILURE TO PRODUCE DOCUMENTS WAS WILFUL

Plaintiff concedes, as it must, that the District Court made no finding that defendants' failure to produce their documents was wilful, but argues (Br. p. 32) that such a conclusion is inescapable "considering the fact that they never searched their own files and considering their six-month delay in attempting to get documents from the brokers." As shown above, twelve of the fourteen defendant cross-petitioners filed affidavits describing the extent to which they had searched their files. As shown in defendants' Main Brief (p. 38), their counsel did attempt to obtain the policies from the London brokers but found that they were too voluminous to bring to Pittsburgh. Plaintiff does not attempt to answer this.

---

[11] Insurance Corporation of Ireland (77a), Continental (78a), Slater-Walker (78a), Yasuda (78a), Nichido (79a), Sahar (79a), Excess (79a), British Reserve (80a) and English and American (80a).

[12] Trident (79a), Stronghold (80a) and Consolidated European (81a).

Plaintiff also charges wilfulness in defendants' failure to offer assistance to the London brokers. The volume of the policies would require an enormous amount of assistance. For this reason defendants' counsel offered to produce defendants' own records at their home offices (99a, 110a, 113a, 114a). If plaintiff desired anything more, it was plaintiff's duty to offer assistance in obtaining it: *Triangle Mfg. Co. v. Paramount Bag Mfg. Co.*, 35 F.R.D. 540, 543 (E.D.N.Y. 1964), where the Court said with respect to records necessary to prepare a compilation desired by defendant that "it seems only fair that the party seeking such information be required to bear the cost of extracting and collating it." To the same affect is F.R.C.P. 33(c).[13]

Plaintiff argues (Br. p. 33) that wilfulness is not a prerequisite for the imposition of a sanction, citing cases indicating that the requirement is "flagrant bad faith," "counsel's 'callous disregard' of their responsibilities" or "gross negligence." The simple answer to this argument is that the District Court did not make any such findings either. His only finding was that defendant had *failed* to produce documents (357a). He found they had been repeatedly[14] ordered to produce them (357a), but he made no finding that it was possible for them to obey his order. Plaintiff cannot, and does not, contest the fact that as a practical matter it was impossible for defendants to bring four million files across the ocean to Pittsburgh.[15]

---

[13] The above principle is a fortiori applicable where records are sought from a non-party: *Petroleum Products Antitrust Litigation*, CCH 1982-1 Fed. Trade Cas. ¶ 64,482 (10th Cir. Jan. 21, 1982).

[14] "Repeatedly" was twice: orally on July 27, 1978 (93a-96a) and again orally on December 21, 1978 (116a), *after* defendants had offered to produce their files in London (99a, 103a, 113a, 114a).

REPLY TO ARGUMENT THAT DEFENDANTS DID NOT PRODUCE THEIR FILES IN LONDON

Plaintiff concludes its argument with respect to defendants' offer to produce their files in London by saying (Br. p. 36) that "When the excess insurers produced documents in London in June and July 1979, documents regarding their Pennsylvania business were not among them." Defendants' counsel offered to produce such documents (217a, 219a, 221a, 224a), but plaintiff's counsel said he was no longer asking for them (219a). The Court then signed orders (226a, 227a), submitted by plaintiff (5a), stating that the issue of in personam jurisdiction should "not be the subject of further discovery, testimony or evidence in this case." (227a). It is thus clear that defendants were ready to exhibit all their records in London beginning July 2, 1979, but plaintiff's counsel did not wish to see them.

---

[15] Plaintiff argues (Br. p. 22 fn. 30) that some of the defendant companies had as few as 20,000 files. To bring even that number of Pittsburgh would obviously also be impossible as a practical matter.

REPLY TO ARGUMENT THAT DEFENDANTS WAIVED THEIR DUE PROCESS ARGUMENT

Plaintiff argues that defendants waived their due process argument founded on *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (5th Cir. 1980), cert. den. 101 S.Ct. 2345 (1981), by not objecting to the district court's discovery and sanction orders on this particular ground.[16]

While the precise manner of stating their objection based on the issue in the *Familia de Boom* case was not used in the district court by defendant cross-petitioners,[17] defendants did object to producing the documents (26a, 68a). In support of its waiver argument, plaintiff cites (Br. p. 37) only cases in which no objection at all was made to the discovery request.

---

[16] The holding in *Familia de Boom*, that a court cannot impose a discovery sanction on a defendant before jurisdiction over his person has been established, was of course based on due process grounds. "Due Process requires that the defendant . . . be subject to the personal jurisdiction of the Court . . .": *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980), citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The improper use of a sanction to impose personal jurisdiction involves a clear violation of the right to due process.

[17] *Familia de Boom* was decided November 7, 1980, after the sanction had been imposed. The decision was not available to defendants in the advance sheets until after the briefs in the Third Circuit had been filed. Defendants should not be held to have waived an argument which, at the time of the alleged waiver, had not been endorsed by the courts: *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) ("an effective waiver must . . . be one of a 'known right or privilege.' ").

More important, defendants had from the very beginning pleaded that they were not subject to personal jurisdiction, not only in their amended answer (22a), but also in their motion for summary judgment dismissing the complaint (35a-39a), and the subject of their compliance or noncompliance with the discovery requests was raised in connection with their denial of personal jurisdiction. Thus, although defendants did not repeat their defense of lack of personal jurisdiction as an objection to discovery, it is submitted that defendants' argument, having been asserted from the outset, was properly preserved for use in the Court of Appeals.

Even if defendants' contention was not raised in the district court in the precise manner in which they now argue it, this Court should consider defendants' argument, and decide the question presented in accordance with the well-settled rule that questions passed upon by the lower appellate court are open for consideration in the Supreme Court, even though they were not raised in or considered by the trial court: *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Moragne v. States Marine Lines*, 398 U.S. 375, 378 fn.1 (1969); *Jones v. United States*, 362 U.S. 257, 272 (1960); *Friend v. Talcott*, 228 U.S. 27 (1913). In *Moragne*, this Court considered a wrongful death claim based on federal maritime law, although it had not been raised in the trial court, saying through Mr. Justice Harlan (p. 379 fn.1 cont'd.):

> "Since the Court of Appeals, without objection, treated the merits of petitioner's attack on *The Tungus* [*The Tungus v. Skovgaard*, 358 U.S. 588 (1959)], we need not consider whether she might otherwise be precluded from pressing that attack here because of her default in failing to urge the same theory in the trial courts."

In the case at bar, the question of whether the district court could properly make a discovery order against defendants before jurisdiction over their persons had been established was raised and fully argued in the Court of Appeals (365a-366a), without objection by plaintiff that it had not been raised below. The Court of Appeals addressed the issue in its opinion (376a), ultimately refusing to follow the holding of *Familia de Boom.* Under the authorities cited above, this Court would therefore be well within the bounds of its broad certiorari jurisdiction to reach and decide the important question of due process on which the decision of the Third Circuit in the instant case and that of the Fifth Circuit in *Familia de Boom* conflict. The Court's "power to decide is not limited by the precise terms of the question presented": *Procunier v. Navarette,* 434 U.S. 555, 559 fn. 6 (1978).

Another contention made by plaintiff cross-respondent under this heading (Br. p. 38 fn. 40) is that the cross-petition for certiorari did not raise the questions of whether a sanction order may be entered against a non-resident defendant without a prior prima facie showing of jurisdiction and whether the sanction violated traditional notions of fair play and substantial justice.

The fundamental question raised by the cross-petition now pending before the Court is whether the district court denied "cross-petitioners, the non-resident defendant corporations who were contesting jurisdiction, due process of law by imposing a sanction finding them subject to personal jurisdiction. . . ." (Cross-petition,

p. i).[18] Under Supreme Court rule 21.1(a), this statement "will be deemed to comprise every subsidiary question fairly included therein."[19] Fairly included therein are subsidiary questions involving the reasons why the sanction was improper, e.g., because there was no preliminary prima facie showing of jurisdiction over the nonresident defendants, and because on the factual situation presented by the record the sanction imposing jurisdiction violated traditional notions of fair play and substantial justice. As shown above (pp. 4-6) and in defendants' Main Brief (pp. 27-28), the District Court's prima facie findings of jurisdiction were not supported by competent evidence and even if they had been, did not encompass sufficient facts to establish jurisdiction.

---

[18] Plaintiff agrees (Br. pp. 1-2) that the grant of certiorari was to review "the propriety of the discovery sanction."

[19] The rule does not limit the Court to the questions brought up in the petition for certiorari: *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 320 fn. 6 (1971), where Mr. Justice White said: "While this rule reflects many decisions stating that the Court is not required to decide questions not raised in a petition for certiorari, it does not limit our power to decide important questions not raised by the parties."

CONCLUSION

Plaintiff cross-respondent has not answered defendant cross-petitioners' arguments.

Respectfully submitted,

EDMUND K. TRENT

REED SMITH SHAW &
McCLAY
747 Union Trust Building
P.O. Box 2009
Pittsburgh, Pennsylvania 15230
412-288-3144

Counsel of record for cross-petitioners

Of counsel

THOMAS P. LAWTON III
KENNETH K. KILBERT